



# San Francisco Law Library

436 CITY HALL

No. 133376

---

## EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions herein-after provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.









2495

**No. 11,718**

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION (a national  
banking association),

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

**APPELLANT'S OPENING BRIEF.**


---

**GEORGE H. KOSTER,**  
300 Montgomery Street, San Francisco, California,  
*Counsel for Appellant.*

**FILED**

**MAR 12 1948**

**PAUL P. O'BRIEN, CLERK**



Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov



## Subject Index

---

	Page
Jurisdictional statement .....	1
Statement of the case .....	3
(a) Nature of the case .....	3
(b) Issues presented .....	13
(c) Facts .....	17
Statute and regulations involved .....	22
Specification of errors .....	27
Summary of argument:	
(a) Section 113(b)(1)(B) authorizes the reduction of the cost of property by prior depreciation "allowed" where in excess of depreciation "allowable" in computing the basis for depreciation. The excessive depreciation deducted by appellant on its tax returns for 1932 to 1935 which was admittedly not allowable under the income tax laws applicable to those years, was not "allowed" within the meaning of that term as used in Section 113(b)(1)(B) because the Commissioner had no authority to allow it, the appellant and the agents of the Commissioner had corrected it, and the legislative history of Section 113(b)(1)(B) indicates recognition by the Legislature of the right of the taxpayer in a case such as this to an allowance of the correct depreciation; and therefore the action of the Commissioner in using the excessive depreciation to reduce the cost basis of appellant's depreciable property, and the action of the District Court in sustaining the Commissioner, should be reversed.	
(b) The District Court should have reopened the case and accepted in evidence the letter from the Internal Revenue Agent in charge notifying appellant that its amended returns for the years 1932 and 1933 were examined and found to be correct .....	30
Argument .....	35
Introductory statement .....	35

	Page
I. The Virginian Hotel Corporation decision is limited to instances where the depreciation taken in prior years had never been challenged by the Commissioner or his agents. Since the prior year depreciation involved in the instant case was challenged by the Commissioner and his agents, the Virginian Hotel Corporation case is inapplicable .....	36
II. The legislative purpose of permitting the basis to be reduced by allowed depreciation was to authorize the application of the doctrine of estoppel against taxpayers seeking to change the depreciation deduction where to permit such change would lead to inequitable results. The statute was not intended as authority for the allowance of an illegal deduction to accomplish an inequitable result .....	40
(a) Legislative history of Section 113(b)(1)(B) shows that the Legislature intended that retroactive adjustments of depreciation should be made where necessary to correct errors and to protect the interests of the taxpayer .....	40
(b) The application of Section 113(b)(1)(B) in the manner in which it was applied by the Commissioner in this case is unjust and inequitable and contrary to the intention of Congress as to the purposes to be accomplished by the section .....	50
III. No adjustment can be made under Section 113(b)(1)(B) for an illegal depreciation deduction which the Commissioner never had authority to allow and therefore could not allow, where the taxpayer is not estopped from contending that the deduction was illegal and had not been allowed .....	58
(a) When the Commissioner found that appellant's depreciation deduction for the years 1932 to 1935 was erroneous and not allowable under the statute authorizing the deduction, he had no authority to allow the deduction either affirmatively or constructively .....	58



	Page
(b) Appellant is not estopped from correcting the erroneous deduction, or from contending that the deduction was illegal and had not or could not have been allowed .....	64
IV. The reporting of the erroneous depreciation was a mistake. The Commissioner should have corrected it. Upon his refusal to do so the appellant should not have been denied the right to correct the mistake, and the amended returns filed by appellant should be accepted .....	66
V. The District Court erred in refusing to reopen the case to receive in evidence the letter received by appellant from the Internal Revenue Agent in charge stating that the amended returns for the years 1932 and 1933 had been examined and accepted as correct .....	73
Conclusion .....	76
Appendix:	
Analysis and discussion of the Virginian Hotel Corporation case .....	i

## Table of Authorities Cited

Cases	Pages
Anna I. Hilpert v. Commissioner (1945), 151 F. (2d) 929	54
Berch v. U. S. (Ct. Cl. 3/6/44), 54 F. Supp. 175, 32 A.F. T.R. 581 .....	64
Central Real Estate Co. v. Commissioner (C.C.A.-5, 1931), 47 F. (2d) 1036, 9 A.F.T.R. 1056 .....	62
Clifton Mfg. Co. v. Comm. (C.C.A.-4, 1943), 137 F. (2d) 290, 31 A.F.T.R. 386, rev'g. 1 T.C. 71.....	64
Com. v. Cleveland Adolph Mayer Realty Corp. (C.C.A.-6, 1947), 160 F. (2d) 1012 .....	5, 61
Commissioner v. Mutual Fertilizer Co. (C.C.A.-5, 1947), 159 F. (2d) 470 .....	5, 61
Commissioner v. Van Vorst (C.C.A.-9, 1932), 59 Fed. (2d) 677, 11 A.F.T.R. 562 .....	61
Emmich v. U. S. (C.C.A.-6, 1924), 298 F. 5, 4 A.F.T.R. 3917	71
F. H. E. Oil Co. v. Commissioner (C.C.A.-5, 1945), 147 F. (2d) 1002 .....	61
H. M. O. Lumber Co. v. Commissioner (C.C.A.-6, 1932), 59 F. (2d) 907, 11 A.F.T.R. 614 .....	62
Jefferson v. Clearfield, Coal & Iron Co. v. U. S. Court of Claims (1936), 14 Fed. Supp. 918, 17 A.F.T.R. 871.....	59
John Milton, 33 B.T.A. 4 .....	64
Lerner Stores Corp. v. Commissioner (C.C.A.-2, 1941), 118 F. (2d) 455, 26 A.F.T.R. 711 .....	71
Levy v. U. S. (C.C.A.-3, 1921), 271 F. 942, 2 A.F.T.R. 1368	71
Lynch v. Tilden (1924), 265 U. S. 315, 320, 44 S. Ct. 488, 4 A.F.T.R. 3980 .....	60
Milford Trust Co. v. United States (1945), 63 Fed. Supp. 618 .....	71
Mrs. R. Z. Wheelock, 28 B.T.A. 611, aff'd C.C.A.-5, 1935, 77 F. (2d) 474, 16 A.F.T.R. 109 .....	64



	Pages
New Colonial Ice Co. v. Helvering (1934), 292 U. S. 435, 54 Sup. Ct. 788, 78 L. Ed. 1348, 13 A.F.T.R. 1180.....	59
R. H. Stearns Co. v. U. S., 291 U. S. 54, 54 S. Ct. 325, 13 A.F.T.R. 842 .....	64
Robinson, Exec. v. Comm., 100 F. (2d) 847 (C.C.A.-6, 1939), certiorari denied .....	64
Stern Bros. v. U. S., 8 F. Supp. 705, Ct. Cls. 1934, 14 A.F.T.R. 987 .....	64
Tidewater Oil Co. (1934), 29 B.T.A. 1208 .....	64
United States v. Ludley, 274 U. S. 295.....	41
U. S. v. Smith (Dist. Ct. La., 1926), 13 F. (2d) 923, 5 A.F.T.R. 6116 .....	71
Virginian Hotel Corporation of Lynchburg v. Helvering, 319 U. S. 523..20, 28, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 48, 57, 74, 76	
Wheelock v. Commissioner, 28 B.T.A. 611 .....	62, 70
Zellerbach Paper Co. v. Helvering (1934), 293 U. S. 172....	71

### Statutes

#### Internal Revenue Code:

Section 23 .....	22, 58, 61
Section 23(k) .....	58
Section 23(l) .....	58
Section 113 (b) (1) (B) .....	
4, 15, 20, 22, 28, 31, 32, 36, 40, 47, 48, 49, 50, 56, 57, 58, 64, 65, 70	
Section 114(a) .....	4, 20, 22, 41
Judicial Code, Section 24 (Twentieth), U.S.C., 1940 Ed., Title 28, Section 41(20) .....	2
Judicial Code, Section 128, U.S.C., Title 28, Sections 225 and 226 .....	2
Judicial Code, Section 177(b), as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C., 1940 Ed., Sec- tion 284) .....	22
Revenue Act of 1924, Section 202(b) .....	41, 42
Revenue Act of 1926, Section 202(b) .....	42
Revenue Act of 1928, Section 111(b) (2) .....	42

<b>Miscellaneous</b>	<b>Pages</b>
Treasury Department Cum. Bul. IV-2, 1925, page 15 .....	42
Treasury Department Cum. Bul. XIV-2, 1935, page 126; I.T. 2944 .....	38, 45
Treasury Department Cum. Bul. III-2, page 163; I.T. 2090 (1924) .....	71
<b>Merten's Law of Federal Income Taxation:</b>	
Volume 1, page 69, Section 3.08 .....	63
Page 89, Section 3.21 .....	63
Volume 4, page 4, Section 23.01 .....	63
1925 Memorandum 4249, Cum. Bul. IV-2, page 15.....	46
Min. 1470, C.B. XIII-1, page 59, C.B. XV-2, page 148.....	68
Min. 2207 (1919) Treasury Department Cum. Bul. 1, page 221 .....	71
O.D. 111 (1919) Treasury Department Cum. Bul. 1, page 224 .....	71
O.D. 113 (1919) Treasury Department Cum. Bul. 1, page 234 .....	71
O.D. 1131 (1921) Treasury Department Cum. Bul. 5, page 289 .....	71
<b>Treasury Department Regulations 101:</b>	
Article 23 (1)-1 .....	23
Article 23 (1)-5 .....	23, 44, 62
Article 23 (1)-9 .....	24
Article 113 (b)-1 .....	26, 44
Article 114-1 .....	25
Treasury Regulations 74, Articles 205 and 561.....	44
Treasury Regulations 45 and 62, Article 1561 .....	41
Report No. 179, 68th Cong., 1st Sess., page 12 .....	41
Report No. 708 of the Committee on Ways and Means, 72d Cong., 1st Sess., page 22, repeated in Senate Report No. 665, same session, page 29 .....	43, 61
Senate Report 52, Senate Finance Committee, 69th Cong., 1st Sess. ....	42
T.D. 3220 (1921) Treasury Department Cum. Bul. 5, 285	71

No. 11,718

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

---

BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION (a national  
banking association),

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division. The opinion of the Court below is reported at 69 F. Supp. 932 and is set forth in the record herein (R. 106).

Appellant is a national banking association organized and existing under and by virtue of the laws of the United States of America. Its principal place of business is in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division (R. 2, ¶ II; R. 38, Stip. ¶ 2).



The action arises under the Internal Revenue laws of the United States and is for the recovery of income taxes assessed against and collected from the Appellant for the years 1938 and 1939 by the Appellee through its agent, Clifford C. Anglim, the then Collector of Internal Revenue for the First Collection District of California who was no longer in office as collector of Internal Revenue at the time this action was commenced (R. 2, 3, ¶ I, III; R. 38, Stip. ¶ 1, 3). After the payment of said taxes the appellant duly filed written claim for refund thereof as provided by law and said claim was rejected by the Appellee through its agent, the Commissioner of Internal Revenue, on April 4, 1944 (R. 11, ¶ XIV; R. 39, Stip. ¶ 4).

This action was commenced in the District Court on November 25, 1944 (R. 140). It was brought pursuant to the provisions of Section 24 (Twentieth) of the Judicial Code, U.S.C., 1940 Ed. Title 28, Section 41(20) (R. 2, ¶ I; R. 38, Stip. ¶ 1).

The matter came on for trial before the District Court and the judgment of that Court was entered March 14, 1947 (R. 142). On June 9, 1947, under authority of Section 128 of the Judicial Code, U.S.C. Title 28, Sections 225 and 226, appeal was taken to this Court to review the judgment of the Court below (R. 132). On July 14, 1947 the Court below, upon motion duly made, extended the time for filing the record on appeal to September 6, 1947 (R. 139). This appeal and the transcript of record were filed and docketed in this Court on August 29, 1947.

## STATEMENT OF THE CASE.

### (a) Nature of the case.

This case involves the income tax liability of the appellant for the years 1938 and 1939. The appellant is claiming a larger deduction for depreciation on buildings, furniture and fixtures than was allowed by the Commissioner of Internal Revenue. It was conceded in the Court below that the appellant was entitled to a larger deduction for depreciation on buildings (R. 58, Stip. ¶ 27; R. 115, ¶ 8) and judgment was entered accordingly. The Court below concluded, however, that the appellant was not entitled to any greater depreciation on furniture and fixtures than was allowed by the Commissioner of Internal Revenue and rejected appellant's claim therefor. This appeal is from the said judgment which, though granting appellant some recovery denied appellant's claim for the balance of the recovery sought in this action.

The method employed by the Commissioner of Internal Revenue in computing the annual depreciation deduction was to take the cost of the property as of December 31, 1935,<sup>1</sup> reduce it by depreciation deducted on the original income tax returns for years prior thereto to determine the unexhausted basis of the property, and to spread that unexhausted basis over the estimated remaining years of useful life of the property (R. 42, Stip. ¶ 9; R. 56, Stip. ¶ 22f).

---

<sup>1</sup>In the settlement of tax controversies for the years 1936 and 1937 the parties hereto reached an agreement as to the amount of depreciation to be allowed as a deduction for those years (R. 44, Stip. ¶ 10), so the matter of the depreciation accumulation for those two years is not in controversy and is not material to the adjudication of the issue in this proceeding.

The primary question in this case is whether in computing the unexhausted basis for depreciation as of December 31, 1935 of the buildings, furniture and fixtures owned by the appellant, the cost of said property should be reduced by *excessive* depreciation taken as deductions by appellant on its original income tax returns for the years 1932 to 1935, or by the *correct* depreciation for those years. The answer to this question depends upon whether under the facts and the law, the excessive depreciation was "allowed" within the meaning of that term as used in Section 113(b)-(1)(B) of the Internal Revenue Code (which by virtue of the provisions of Section 114(a) prescribes the basis for depreciation as well as the basis for gain or loss) which provides as follows:

"Section 113(b) The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

(B) In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws \* \* \*"

All of the facts in this case were stipulated as hereinafter explained in the "Facts" subsection of this brief (infra, p. 17). The District Court incorpo-



rated by reference as part of its Findings of Fact, the matters set forth in these stipulations (R. 114, ¶ 2).

Prior to January 1, 1932 the annual depreciation computed by the appellant bank for income tax purposes was exactly the same as the depreciation computed for bookkeeping purposes (R. 119, ¶ 20; R. 48, Stip. ¶ 16). In 1930 and 1931 the Bank reported large net losses on its tax returns and deducted substantial amounts on those returns for depreciation (R. 44, Stip. ¶ 12). However, there is nothing to indicate that the depreciation deducted in those years was not considered fair and reasonable on the basis of the conditions and facts known at that time, although on the basis of facts subsequently developed the depreciation was excessive. The Bank acknowledges and has acknowledged throughout this proceeding, that the *allowable* depreciation is the depreciation computed on the facts known at the time the deduction is taken and so has made no claim in this proceeding that there should be any restoration to the basis of its property, of any depreciation deducted in the years 1930 and 1931 even though no tax benefit was obtained from those deductions. (*Commissioner v. Mutual Fertilizer Co.* (C.C.A.-5, 1947), 159 F. (2d) 470; *Cleveland Adolph Mayer Realty Corp.* (C.C.A.-6, 1947), 160 F. (2d) 1012).

In 1931 and 1932 the Bank inspected and surveyed all of its properties and made a revised estimate of the condition of those properties and of their useful lives; and on the basis of that estimate it determined that the depreciation schedules then being used were in-

correct, and it compiled a new schedule for the computation of the depreciation, and commencing January 1, 1932, this new schedule was used for determining the depreciation which was written off on the books of the Bank for the years 1932 to 1939 inclusive (R. 119, ¶ 20; R. 57, Stip. ¶ 25); *and it is stipulated in effect that the depreciation on furniture and fixtures computed under this schedule for the years 1932 to 1935 was the correct depreciation allowable as a deduction under the applicable income tax statutes in those years* (R. 126, ¶ 35; R. 58, Stip. ¶ 26a), and the depreciation on banking premises computed under this schedule was actually a bit less than the amount allowable for the years 1932 to 1935 (R. 58, Stip. ¶ 26b).

The Tax Department of the Bank in preparing the income tax returns for the years 1932 to 1937 inclusive ignored the revised depreciation schedule for various practical reasons stated in the stipulation in this case (R. 60, Stip. ¶ 31, 32), and continued to report as the depreciation deduction the depreciation computed on the schedule used by the Bank prior to 1932 (R. 119, ¶ 20) though fully cognizant that the depreciation deduction so computed was incorrect (R. 62, Stip. ¶ 31c). The official of the Bank responsible for the Bank's income tax return did not know that this practice was being followed until 1938 (R. 67, Stip. ¶ 33). In 1938 and 1939, the tax years involved in this proceeding, the practice of continuing the obsolete and incorrect depreciation schedules was stopped (R. 62, Stip. ¶ 31(d) (e)) and the income tax returns for those

years reflect as deductions the depreciation as computed under the said correct schedule being used by the Bank for bookkeeping purposes (R. 119, ¶ 20; R. 63, Stip ¶ 31e).

The Bank had net losses for income tax purposes for each of the years 1932 to 1935 inclusive in excess of the entire amount of depreciation deducted in the respective year, so obtained no tax benefit whatever from the depreciation deduction or any part of it (R. 120, ¶ 21a; R. 44, Stip. ¶ 12, 13). Since the depreciation deducted each year (approximately 170% of book (correct) depreciation) was substantially in excess of the depreciation taken on the Bank's books, the excess had to be and was disclosed on a reconciliation schedule on the tax return for each of those years (R. 124, ¶ 29; R. 60, Stip. ¶ 30), so the Commissioner was on notice that there was this substantial difference between the depreciation deducted in each of those years and the depreciation charged off by the Bank on its books in those respective years (R. 60, Stip. ¶ 30).

In February 1937 an Internal Revenue Agent, a duly authorized representative of the Commissioner of Internal Revenue, commenced an audit of the Bank's 1935 income tax return; the Bank called his attention to the fact that the depreciation deducted on the return was excessive and requested him to cooperate with it in the preparation of correct depreciation schedules; the Agent recognized the error but in the course of his audit concluded that there would not be sufficient adjustment, including the depreciation ad-



justment, to result in a tax liability for the year; and he thereupon refused to prepare or aid in the preparation of a revised depreciation schedule because, under established Bureau of Internal Revenue procedure, he was not allowed to compile or aid in the compilation of revised depreciation schedules where any adjustment which might result therefrom would not result in a tax liability (R. 121, ¶ 21(c); R. 50, Stip. ¶ 19).

In accordance with Bureau procedure (R. 122, ¶ 22), after the Agent progressed far enough in his audit to be satisfied that there would not be sufficient corrections to result in a tax liability, he so reported to his superiors who transmitted his report and the tax return to the Bureau of Internal Revenue (R. 30, Stip. ¶ 6). This was true as to the audit of all years 1932 to 1935 (R. 120, ¶ 21b; R. 33, Stip. ¶ 16 to 21). The Bureau, upon receipt of the case, reviewed it, approved it, and sent it to the closed filed (R. 121, ¶ 21d). The Bank was not furnished with a copy of the Agent's report (R. 30, Stip. ¶ 6).

The same thing happened in January 1938, when another Internal Revenue Agent audited the Bank's 1936 income tax return (R. 122, ¶ 24; R. 51, Stip. ¶ 20). Subsequently in 1939, after the 1936 return had been accepted by the Bureau of Internal Revenue, it was reaudited by the Internal Revenue Agent's office and adjustments were proposed which did result in a tax liability for that year (R. 122, ¶ 25; R. 52, Stip. ¶ 21). The additional taxes proposed as the result of this reaudit were contested and finally settled by

stipulation (R. 35, Stip. ¶ 22; R. 44, Stip. ¶ 10). No specific authorization from the Commissioner of Internal Revenue for this reaudit or redetermination of tax liability was secured (R. 35, Stip. ¶ 22), nor was it required since it came within the extensive general delegation of authority by the Commissioner of Internal Revenue to his field agents (R. 31, Stip. ¶ 7; R. 33, Stip. ¶ 15). In the course of this reaudit and the concurrent audit of the returns for the years 1937, 1938 and 1939, the matter of the revision of the depreciation schedules and the correction of the depreciation deduction was given careful attention by the Internal Revenue Agents and the Bank (R. 53, Stip. ¶ 22; R. 35, Stip. ¶ 22, 23) and revised depreciation schedules were prepared (R. 144, Ex. 3 at R. 151 to 192; and Ex. 16, R. 273 and 274, which are but two of 80 schedules as stipulated, R. 294).

The preparation of these revised depreciation schedules for approximately 500 buildings and the furniture and fixtures contained therein was a tremendous job extending from December 1939 to November 1941; and under the direction of Internal Revenue Agents the Bank employed an independent appraisal and engineering company to report upon factors required for use in the schedule, and employed a special staff of men to work on the compilation of the schedule (R. 53, Stip. ¶ 22). The record shows that it was because of the full appreciation of the intricate nature of this job, that the Bank's tax department employees and representatives did not undertake the revision of the schedules until they could have the opportunity to do

so in conjunction with the cooperation of the Government agents (R. 63, Stip. 31e; R. 66, Stip. ¶ 32g).

The revised schedules were so constructed that the remaining cost of the property (cost less depreciation) as of December 31, 1935, was first computed, and the annual depreciation thereon was the prorata of that remaining cost spread over the estimated remaining useful life of the property; and in the resultant revised schedules the Bank's consistent contention that the depreciation was wrong ever since January 1, 1932 and should be corrected in determining the correct remaining cost as of December 31, 1935, was recognized and the remaining cost as of December 31, 1935 was computed by deducting from the cost only the correct (or allowable) depreciation for the years 1932 to 1935 (R. 124, ¶ 32; R. 54, Stip. ¶ 22(b) (c) (d)). The revised schedules were mutually acceptable to the Bank and the Internal Revenue Agents (R. 36, Stip. ¶ 23; R. 54, Stip. ¶ 22b).

When the revised depreciation schedules were referred to the Commissioner of Internal Revenue (Bureau of Internal Revenue, Washington, D. C.) in November 1941, the Bureau rejected them on the ground that the tax returns for the years 1932 to 1935 had been "accepted" and therefore the depreciation deducted thereon was "allowed" and had to be deducted from the cost of the property to determine the basis for depreciation regardless of whether the depreciation deducted on the return was right or wrong and regardless of whether the Bureau knew that the deduction was wrong (R. 125, ¶ 32; R. 36, Stip.



¶ 23, 24). The revised schedules were thereupon discarded by the Bureau and the depreciation was recomputed on the basis of cost as of December 31, 1935 reduced by the excessive depreciation deducted on the tax returns for 1932 to 1935 (R. 125, ¶ 32; R. 56, Stip. ¶ 22f; R. 193). The remaining cost as computed by the Bureau on furniture and fixtures was approximately \$1,400,000 less than was computed in the revised depreciation schedule and on banking premises was approximately \$600,000 less than was computed in the revised depreciation schedule (R. 118, ¶ 19; R. 183), so the Bureau action in effect wiped out approximately \$2,000,000 of capital investment which on the basis of the revised depreciation schedules which had been prepared by the Bank and the Revenue Agents would have been returned to the Bank through depreciation deductions in years following 1935.

The record shows that on December 10, 1941 (before the case of the Virginian Hotel Corporation of Lynchburg hereinafter discussed started on its course of litigation) the taxpayer presented in writing to the Commissioner of Internal Revenue a statement of the facts as herein presented and urged the acceptance of the revised schedules (R. 275) and from then until 1945 representatives of the Bank held a number of conferences with the representatives of the Bureau in an effort to secure acceptance of the schedules (R. 66, Stip. ¶ 32h). Although the Bank had at all times been considering the filing of amended returns for 1932 to 1935 its representatives felt confident that mutually acceptable depreciation schedules could be worked out

and that the filing of amended returns would thus be rendered unnecessary (R. 66, Stip. ¶ 32h). However, when in 1945 the Bureau of Internal Revenue finally concluded conferences with the Bank's representatives by refusing to accept the revised depreciation schedules even though acknowledging that those schedules reflected the correct depreciation for the years 1932 to 1935, the Bank filed amended returns for the years 1932 to 1935 reporting thereon the correct deduction for depreciation for the respective years as reflected in the said revised depreciation schedules (R. 67, Stip. ¶ 32i). The correction of the depreciation did not overcome the net losses for those years so the amended returns showed no tax liability (R. 232, 239, 260, 266). The Government was not deprived of any tax by reason of the correction.

The Bureau of Internal Revenue refused to consider the amended returns for any purpose up to the time the stipulation filed in this proceeding were signed (R. 127, ¶ 39; R. 37, Stip. ¶ 25). However, after this case was submitted to the District Court the Bank received a letter from the Internal Revenue Agent in Charge advising it that the Amended returns for 1932 and 1933 were accepted as correct; and Appellant Bank filed a motion in the District Court to reopen the case to receive this letter in evidence and the Government opposed the motion by contending that the examination and acceptance of the amended return was all a mistake (R. 69-105). The Court denied the motion and that action is assigned as one of the errors in this appeal (R. 113, 138, ¶ 10; R. 291).

The Court below sustained the Commissioner's action in reducing the property cost by the excessive depreciation taken in the years 1932 to 1935, concluding that "*disclosure of the excessive depreciation claimed and disallowance of its deduction by revenue agents or by the Commissioner does not authorize the latter to rectify the taxpayer's mistake or error of judgment. I am unable to perceive any basis for a different conclusion in this case from that enunciated in the Virginian Hotel Corporation case.*" (R. 112).

It is appellant's position that because of the difference in facts, the Virginian Hotel Corporation decision has but limited application to this case; that whether or not that decision is applicable, the above quoted conclusion of the Court below is not a correct interpretation or application of that decision; and, that under the facts and under the law, in determining the basis for depreciation as of December 31, 1935 the cost of the property should not have been reduced for depreciation for the years 1932 to 1935 inclusive, by any greater amount than the stipulated correct depreciation for those years which was charged off on the books of the Bank, accepted by the Government agents in their compilation of depreciation schedules, and reported on the amended returns for those years.

**(b) Issues presented.**

A. The ultimate issue involved is the determination of the basis for computing depreciation on furniture and fixtures and the amount of depreciation

thereon to which plaintiff is entitled as a deduction in computing its taxable net income for the years 1938 and 1939; and more particularly, this issue involves the following questions of law:

(1) Whether the Commissioner or Internal Revenue, in computing the basis for depreciation on banking premises and on furniture and fixtures, acted properly and legally in reducing the cost of said property by excessive depreciation taken in error by plaintiff as a deduction on its original income tax returns for the years 1932 to 1935 inclusive, where

(a) Plaintiff called the Commissioner's attention to these errors and finally corrected them by the filing of amended returns to report the correct deduction for depreciation for those years, and

(b) Prior to the filing of the amended returns, plaintiff in collaboration with the agents of the Commissioner of Internal Revenue in work which extended over a period of almost two years had compiled a corrected depreciation schedule for all years reflecting the correct deductions for the years 1932 to 1935, which corrected schedule was mutually acceptable to the plaintiff and to the agents of the Commissioner of Internal Revenue, but was rejected by the Commissioner on the ground that the cost had to be reduced by the excessive deductions taken on the original returns for the years 1932 to 1935 inclusive because he had "accepted" the original returns for those years and had thereby "allowed" the depreciation taken as a deduction thereon within the meaning of



Section 113(b)(1)(B) of the Internal Revenue Code and such allowance was conclusive regardless of whether the amount "allowed" was right or wrong.

(2) Whether under the particular facts of this case the Commissioner of Internal Revenue did "allow" the depreciation taken on the original return for 1932 to 1935 inclusive, within the meaning of the term "allowed" as used in Section 113 (b)(1)(B) of the Internal Revenue Code, where

(a) he was on notice, first constructive and then actual, that the depreciation deducted was erroneous, and

(b) he had challenged the tax returns and the deductions taken thereon by sending the returns to his field agents for examination and audit, and

(c) his agents had challenged the depreciation deductions and deferred the correction thereof until it could be done, and actually was done by them, in conjunction with an audit of a later year tax return involving a tax liability;

and if he did "allow" the original deduction when he "accepted" the original returns, whether that allowance, under the circumstances in this case, was legal, effective, and conclusive.

(3) Whether under the particular facts of this case, the Commissioner of Internal Revenue should have considered and given effect to the amended re-

turns filed by plaintiff for the years 1932 to 1935 inclusive, where

(a) the plaintiff had already called the Commissioner's attention to errors in the depreciation deduction, and

(b) the amended returns reflected the admittedly correct depreciation deduction for those respective years, and incorporated the information which the Commissioner's Agents had considered when they examined the original returns for 1935 and 1936 and when they compiled their report correcting the depreciation deduction for the years 1932 to 1935.

(4) Whether the consideration and acceptance of those amended returns by the agents of the Commissioner of Internal Revenue after this proceeding was submitted to the District Court for decision (the evidence with respect to which the District Court Judge refused to hear by his action in denying plaintiff's motion to set aside the Order for submission and to reopen the case to hear such evidence) constitutes an allowance of the correct depreciation deductions which were taken on those amended returns.

B. A further issue in this case is whether the District Court erred in denying plaintiff's motion to reopen the case and to hear evidence as to the consideration and acceptance of the amended returns for the years 1932 to 1935 inclusive by the Agents of the Commissioner of Internal Revenue after the stipulation of facts in the case had been filed with the Court.

**(c) Facts.**

The facts were agreed upon and are admitted by the pleadings or stipulated in the written stipulations of facts which were filed with the Court below and adopted by said Court as part of its findings of fact (R. 114 ¶ 2).

In its Findings of Facts the Court also gave a lengthy summary of the stipulated facts (R. 114 to 127). In the foregoing statement herein of the "nature of the case" there is presented the salient features of the case upon which the appellant's position and argument will be premised. Where further detailed facts are important to the propositions presented reference will be made thereto in the argument but in the interest of brevity and succinct presentation, we are taking the liberty of submitting at this point merely a reference to the stipulated facts and a short summary explaining the stipulations and their contents in lieu of including herein the lengthy and detailed stipulated facts which are set forth in full in the Transcript of Record in the proceeding (R. 28-68 and Exhibits R. 144 to 290).

The Stipulation of Facts was submitted in two parts identified as Stipulation No. 1 (R. 28) and Stipulation No. 2 (R. 38) and as a part of the latter there were submitted 17 exhibits referred to therein. Although all the exhibits were brought up to this Court, certain portions not considered essential to the consideration of the issues were omitted from the printed record (R. 144-290; Stip. R. 292-294).

Stipulation No. 1 is devoted primarily to a statement of the procedure followed by the offices of the Commissioner of Internal Revenue in the handling and audit of a tax return; of the extensive delegations of authority to the field agents under the decentralization method for audit of returns; of the practice followed in the audit of returns showing net losses; of the practice of reopening closed returns; of certain procedure followed in the audit of Appellant's original tax returns for the years 1932 to 1936 inclusive; of the action of the Bureau of Internal Revenue rejecting the revised depreciation schedule prepared by its own agents and the Appellant; and of the Bureau refusal up to that time to consider the amended returns filed by Appellant for the years 1932 to 1935 inclusive.

Stipulation No. 2 contains a statement of the jurisdictional facts such as the filing of the returns, payment of the tax, filing of the refund claims, rejection of the claims, etc.; of the depreciation deductions reported on the respective returns for the years 1930 to 1939 inclusive and the adjustments made thereto by the Commissioner for the years 1938 and 1939; of the method employed by Appellant in computing the depreciation for accounting purposes prior to 1932, and for 1932 and subsequent years; of the mistake in the reporting of the depreciation on the original tax returns for the years 1932 to 1935 inclusive and reasons therefor and the efforts made by Appellant to correct this mistake; of the audit of the returns and the action taken by the Agents following



the prescribed procedure as outlined in Stipulation No. 1; of the challenge of the depreciation deduction by the Revenue Agents; of the extensive work and expense involved in the compilation of the revised depreciation schedule by the Revenue Agents and the Appellant (Exhibit 16 to the stipulation (R. 273-274) containing two of 80 similar schedules (R. 293) is a copy of those schedules on buildings alone, and Exhibit 3 (R. 151 to 196) contains the Engineer Revenue Agent's report of his work and the problems involved in the preparation of the revised schedules); of the fact that the depreciation taken by Appellant on its books was the correct and allowable depreciation for the years 1932 to 1935 inclusive and the revised depreciation schedules reflect that depreciation as the correct depreciation; and of the fact that Appellant filed amended returns for the years 1932 to 1935 reporting thereon the correct depreciation allowable for those years.

As explained in the statement herein of the "nature of the case" although the Commissioner had not considered the amended tax returns for any purpose up to the time the stipulations were signed, after the case was submitted to the Court the Appellant received a letter from the Internal Revenue Agent in Charge advising it that its amended returns for 1932 and 1933 had been examined and accepted as correct. After receipt of this letter the plaintiff (Appellant herein) filed a motion with the District Court to reopen the case to accept this letter in evidence. The defendant filed objection thereto contending that the examina-

income as determined by the Commissioner, the plaintiff, on March 17, 1942, overpaid its income and excess-profits taxes and deficiency interest paid thereon to the defendant as follows:

<u>Year</u>	<u>Tax</u>	<u>Deficiency Interest</u>	<u>Total Overpayment</u>
1938	\$ 8,264.57	\$1,475.48	\$ 9,760.05
1939	5,112.00	603.73	5,715.73
	<u>\$13,396.57</u>	<u>\$2,079.21</u>	<u>\$15,475.78</u>

and plaintiff is entitled to recover a judgment against the defendant for the aggregate sum of \$15,475.78, together with interest thereon to be computed from and after the date of payment thereof (March 17, 1942), as provided by Section 177 (b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 ed. Sec. 284).

---

#### STATUTE AND REGULATIONS INVOLVED.

##### STATUTE:

###### *Internal Revenue Code:*

Section 23—In computing net income there shall be allowed as deductions:

(1) *Depreciation*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, \* \* \*

Section 114(a) Base for Depreciation.—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property

shall be the adjusted basis provided in Section 113(b) for the purpose of determining gain upon the sale or other disposition of such property.

Section 113(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; \* \* \*

Section 113 (b) The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

(B) In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws \* \* \*

#### REGULATIONS:

Treasury Department Regulations 101 relating to the Income tax under the Revenue Act of 1938.

Art. 23 (1)-1. Depreciation.—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income.

Art. 23 (1)-5. Method of Computing Depreciation Allowance.—

The capital sum to be recovered shall be charged over the useful life of the property, either in

equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed.

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years.

Art. 23 (1)-9. Records of Depreciable Property.—In order that the verification of depreciation allowances claimed by the taxpayer may be facilitated, depreciation shall be recorded on the taxpayer's books, the amount measuring a reasonable allowance for depreciation either being deducted directly from the book value of the assets or preferably being credited to a depreciation reserve



account, which should be reflected in the annual balance sheet. For the same reason the allowance shall be computed and recorded with express reference to specific items, units, or groups of property, each item or unit being considered separately or specifically included in a group with others to which the same factors apply. Also, the taxpayer's books shall show the basis of the depreciable property and any adjustments thereto, and, in cases where the basis of the property is other than cost, or value on March 1, 1913, or value at date of acquisition (as, for example, if the property was acquired by gift or transfer in trust after December 31, 1920), or through a reorganization of a tax-free exchange (see particularly section 113 (a)), the books shall show the data used in ascertaining such basis and the adjustments thereto. If a taxpayer does not desire to have his regular books of account show all of the factors entering into the computation of depreciation allowances, such factors shall be recorded in permanent auxiliary records which shall be kept with and reconciled with the regular books of accounts.

**Art. 114-1. Basis for Allowance of Depreciation and Depletion.—**

The basis upon which exhaustion, wear and tear, obsolescence, and depletion will be allowed in respect of any property is the same as is provided in section 113-(a), adjusted as provided in section 113-(b), for the purpose of determining the gain from the sale or other disposition of such property, except as provided in article 23 (m)-3, relating to depletion based on discovery value, in

article 23 (m)-4, relating to percentage depletion in the case of oil and gas wells, and in article 23 (m)-5, relating to percentage depletion in the case of coal mines, metal mines, and sulphur mines or deposits.

Art. 113(b)-1. The cost or other basis must also be decreased by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion to the extent such deductions have in respect of any period since February 28, 1913, been allowed (but such decrease shall not be less than the amount of deductions allowable) under the Revenue Act of 1938 or prior income tax laws. The adjustment required for any taxable year or period is the amount allowed or the amount allowable for such year or period under the law applicable thereto, whichever is the greater amount. A taxpayer is not permitted to take advantage in a later year of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. The determination of the amount properly allowable shall, however, be made on the basis of facts reasonably known to exist at the end of such year or period. The aggregate sum of the greater of such annual amounts is the amount by which the cost or other basis of the property shall be adjusted. For example, the case of Corporation A discloses the following facts as of January 1, 1938:

<u>Year</u>	<u>Allowed</u>	<u>Allowable</u>	<u>Allowed, but not less than amount allowable</u>
1931	\$6,000	\$5,000	\$6,000
1932	7,000	6,500	7,000
1933	6,500	6,500	6,500
1934	6,500	6,000	6,500
1935	5,000	6,000	6,000
1936	4,500	6,000	6,000
1937	4,000	6,000	6,000
	<hr/>	<hr/>	<hr/>
	\$39,500	\$42,000	\$44,000

The depreciation allowed but not less than the amount allowable in this example as of January 1, 1938, is \$44,000, and the cost or other basis of the property is to be adjusted by that amount.

#### SPECIFICATION OF ERRORS.

The appellant relies upon the following errors committed by the District Court (R. 136-138).

1. The District Court erred in deciding that appellant is entitled to a deduction for the years 1938 and 1939 for depreciation of furniture and fixtures only as allowed by the Commissioner of Internal Revenue in the amount of \$380,762.15 and \$419,718.48 respectively, instead of the higher amount claimed by appellant in its complaint in this proceeding.

2. The District Court erred in its conclusion of law sustaining the Commissioner of Internal Revenue in reducing appellant's cost of its furniture and fixtures by admittedly excessive depreciation for the years 1932 to 1935 inclusive, to determine the basis for computing the depreciation deduction for later years.

3. The District Court erred in deciding as a matter of law that the Commissioner "allowed" the depreciation deducted by the appellant on its original return for the years 1932-1935, within the meaning of the term "allowed" as used in Section 113(b)(1)(B) of the Internal Revenue Code.

4. The District Court erred in deciding as a matter of law that "disclosure of the excessive depreciation claimed and disallowance of its deduction by revenue agents or by the Commissioner does not authorize the latter to rectify the taxpayer's mistake or error of judgment".

5. The District Court erred in deciding as a matter of law that there is no basis for a different conclusion in this case than the conclusion reached by the U. S. Supreme Court in the case of *Virginian Hotel Corporation of Lynchburg v. Helvering*, 319 U. S. 523.

6. The District Court erred in *failing to decide* as a matter of law—

(a) that the Commissioner of Internal Revenue was bound to accept the determination of his agents as to the correct depreciation allowance for the years 1932 to 1935, and

(b) that the Commissioner of Internal Revenue could not reject the determination and allowance made by his agents, and could not in lieu thereof make a determination "allowing" a depreciation deduction for those years not authorized by the income tax statutes applicable to those years.



7. The District Court erred in failing to conclude that under the circumstances of the case the Commissioner had no authority to allow a depreciation deduction for the years 1932 to 1935 in excess of the amount allowable under the income tax statutes applicable to those years.

8. The District Court erred in failing to decide as a matter of law that the correct basis for depreciation of furniture and fixtures as of December 31, 1935 is the cost of said furniture and fixtures reduced by the stipulated correct depreciation allowable for the years 1932 to 1935 rather than the cost reduced by the erroneous depreciation deducted on the original income tax returns for those years.

9. The District Court erred in failing to decide as a matter of law that the plaintiff corrected its erroneous returns for 1932 to 1935 by requesting the Commissioner and his agents to correct the depreciation taken as a deduction thereon, and by the filing of amended returns for those years which did report the correct depreciation deduction.

10. The District Court erred in denying appellant's motion to reopen the case to introduce evidence of the fact that after the filing of the stipulation of facts, the Commissioner of Internal Revenue through his Agents did consider the amended returns filed by the appellant for the years 1932 to 1935 inclusive and accepted them as correct.

11. The District Court erred in failing to give judgment for appellant in the full amount prayed for in the complaint.

### SUMMARY OF ARGUMENT.

The Appellant raises no objection to the Government's method of computing depreciation by taking the unexhausted cost of the property at the beginning of the taxable year and spreading it over an estimated useful life from the beginning of the year.

The Appellant concedes that the statute requires that the cost basis for depreciation must be reduced by not less than the allowable depreciation for prior years regardless of whether tax benefit was derived therefrom.

The Appellant concedes that the cost basis for depreciation must be reduced by the depreciation allowed in prior years even though in excess of the amount allowable *if* that depreciation was actually and legally allowed under the income tax laws applicable to that year, or *if* a tax benefit had been derived therefrom (estoppel).

The Appellant concedes that the mere fact that it did not obtain a tax benefit from the excessive depreciation deducted by it on its original tax returns for the years 1932 to 1935 inclusive, does not *in itself* justify a conclusion that the erroneous depreciation could not have been "allowed". (This concession is induced only by the *Virginian Hotel Corporation* decision which until modified or reversed must be recognized as a controlling decision on this point, although appellant believes that the record in this case emphasizes the merits of the views of the four dissenting Justices as expressed in the dissenting opinions in that case). However, the fact that the excessive de-

duction did not result in a tax benefit, *coupled* with the fact that the Commissioner knew that the deduction was excessive and that he and his agents challenged it and his agents corrected it, does justify the conclusion that the excessive depreciation was not allowed and could not have been allowed legally.

"The question to be argued is confined by reason of these concessions to whether the excessive depreciation reported by the plaintiff on its original income tax returns for the years 1932 to 1935, inclusive, was "allowed under this Chapter or prior income tax laws" within the meaning of that phrase as used in the statute (Section 113 (b)(1)(B)); and the decision on this question is dependent entirely upon the application of the equities of the case and a reasonable and proper construction of the statute, to the stipulated facts. A summary of the appellant's argument is:

## I.

The record shows that the tax returns for 1932 to 1935 were assigned to the field agents of the Commissioner of Internal Revenue for examination and audit. This in itself might be said to be a challenge of the returns and the items claimed as deductions thereon. Also, the record shows that the depreciation deducted on the original returns for the years 1932 to 1935 was excessive and was reported by mistake and the agents of the Commissioner did challenge and did correct it. These facts distinguish this case from the *Virginian Hotel Corporation* case and preclude a determination that the erroneous depreciation was "allowed under this chapter or prior income tax laws" within the

meaning of that term as used in Section 113(b)(1)-(B).

## II.

The action of the Commissioner sustained by the Court below, in wiping out approximately \$2,000,000 of appellant's capital investment which it is conceded would have been returnable to the appellant through depreciation allowances in years after 1935 had the depreciation been correctly computed on the original tax returns for the years 1932 to 1935, is inequitable and unjust, and therefore in conflict with Section 113(b)(1)(B) and with the legislative intent that Section 113(b)(1)(B) be so administered as to accomplish equitable results.

The conclusion of the Commissioner and the Court below to the effect that the erroneous depreciation deduction taken on the original returns for 1932 to 1935 is conclusive and that no retroactive correction thereof may be made is in conflict with the expressed intentions of the Legislature that retroactive adjustments may be made if necessary to protect the interests of the taxpayer, for which reason no expressed prohibition against retroactive adjustments was inserted in Section 113(b)(1)(B).

## III.

The Commissioner had no authority to "allow" the excessive depreciation deducted by appellant on its original 1932 to 1935 tax returns, because the amounts deducted were not authorized by the income tax laws; and when the Commissioner and his agents who chal-



lenged the deduction were on notice that the deduction did not comply with the income tax law and was not allowable thereunder, they had no power or authority to "allow" the erroneous deduction especially when the appellant had obtained no tax benefit from the erroneous deduction and could not therefore be estopped from demanding a correction of the erroneous deduction.

Although the Commissioner may not be bound by unaccepted conclusions of his agents, he is bound by their knowledge of the facts and cannot make a determination contrary to those facts. In this case the Agents knew that as a matter of fact the depreciation deducted on the original returns for the years 1932 to 1935 was excessive and unreasonable and therefore *not* allowable under the income tax statutes applicable to those years, so the Commissioner could not reject these facts and make a determination in conflict therewith and in conflict with the statute authorizing the depreciation deduction.

#### IV.

The appellant had the right to correct its mistake and did so by preparation of revised depreciation schedules in collaboration with the Commissioner's agents and by the filing of amended returns for the years 1932 to 1935 which reported the correct depreciation, and the Commissioner should have given effect to those corrections in the computation of the depreciation deduction for the years here involved.

The later examinations and acceptance of the amended returns by the Commissioner's Agents, evidence with respect to which the District Court excluded, is confirmation of those returns, and even though the Commissioner successfully opposed the introduction of evidence with respect thereto on the ground that the examination and acceptance of the returns was a mistake, there was no contention that the amended returns did not reflect the correct depreciation deduction and correct net loss. The Court below should have accepted the evidence, if not as evidence of the acceptance of the returns, then certainly as further evidence of a deliberate purpose on the part of the Commissioner to do nothing which might produce a fair and equitable result in this case for fear it might be in violation of the *Virginian Hotel Corporation* case. There is nothing in the income tax statutes or the *Virginian Hotel Corporation* case which prevents the Commissioner from considering and accepting the amended returns filed by appellant in this case. The Commissioner must administer the income tax laws according to their provisions and has no authority or right to refuse to make an allowance provided for by the statute, or to make an allowance which violates the statute.

In computing the basis for depreciation as of December 31, 1935 the cost of the property should not have been reduced by any amount greater than the stipulated reasonable, correct and *allowable* depreciation for the years 1932 to 1935.

## ARGUMENT.

## INTRODUCTORY STATEMENT.

The District Court was of the opinion that the *Virginian Hotel Corporation* case required the conclusion that the Commissioner "accepted" the tax returns for the years 1932 to 1935 when they were filed, and by reason of such acceptance of those returns the depreciation deduction taken thereon must be deemed to have been *conclusively* allowed (R. 111-112). The District Court seemed to be of the opinion that this was the proper construction of the *Virginian Hotel Corporation* decision regardless of the facts in this case showing that the Commissioner knew that the depreciation was erroneous, that through his agents the Commissioner challenged and corrected the depreciation even though he refused to give effect to the correction in the computation of the tax liability for later years, that the taxpayer itself corrected the depreciation through its contact and work with the Internal Revenue Agents and through the filing of amended returns for the years 1932 to 1935, and that the Government was not deprived of any taxes for the years 1932 to 1935. If this Court should be of the same opinion as the Court below as to the construction and effect of the *Virginian Hotel Corporation* decision, the judgment of the Court below will have to be sustained.

If this Court should conclude, as will be argued herein, that the *Virginian Hotel Corporation* case is distinguishable and therefore not controlling of the disposition of this case, and if this Court is satisfied

that regardless of that case the erroneous depreciation taken on appellant's original tax returns for the years 1932 to 1935 inclusive was not "allowed" within the meaning of that term as used in Section 113(b)(1)(B) of the Internal Revenue Code, the decision below should be reversed.

This argument therefore is so designed as, first, to show the inapplicability of the *Virginian Hotel Corporation* case, and second, to justify the allowance of the stipulated correct depreciation for the years 1932 to 1935 as the proper amount to be taken from the cost of the Appellant's buildings and furniture and fixtures to determine the unexhausted basis of that property as of December 31, 1935 for depreciation purposes.

---

## I.

**THE VIRGINIAN HOTEL CORPORATION DECISION IS LIMITED TO INSTANCES WHERE THE DEPRECIATION TAKEN IN PRIOR YEARS HAD NEVER BEEN CHALLENGED BY THE COMMISSIONER OR HIS AGENTS. SINCE THE PRIOR YEAR DEPRECIATION INVOLVED IN THE INSTANT CASE WAS CHALLENGED BY THE COMMISSIONER AND HIS AGENTS, THE VIRGINIAN HOTEL CORPORATION CASE IS INAPPLICABLE.**

The only point decided by the U. S. Supreme Court in the *Virginian Hotel Corporation* case was that a depreciation deduction may have been allowed even though no tax benefit was derived therefrom.<sup>2</sup> The Supreme Court without the benefit of any evidence as

---

<sup>2</sup>See appendix for history of litigation in *Virginian Hotel Corporation* case, and further specification of its distinguishing features.



to the procedure for handling returns in the Bureau of Internal Revenue, volunteered a theoretical point of view as to the effect of the acceptance of a return upon the "allowance" of a deduction thereon by stating:

" 'Allowed' connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail numerous deductions. If the deductions are not challenged, they certainly are 'allowed' since tax liability is then determined on the basis of the returns. Apart from contested cases, that is indeed the only way in which deductions are 'allowed'. And when all deductions are treated alike by the taxpayer and by the Commissioner, it is difficult to see why some items may be said to be 'allowed' and others not 'allowed'. It would take clear and compelling indications for us to conclude that 'allowed' as used in Section 113(b)(1)(B) means something different than it does in the general setting of the revenue acts."

The Commissioner apparently construes this decision as *requiring* him to assert against the Appellant that by accepting a return, the depreciation deduction taken thereon is conclusively allowed whether or not he was fully aware that the deduction was excessive and illegal. However, the Commissioner must believe that the *Virginian Hotel Corporation* case does not apply and the deduction is not conclusive in cases where an adjustment of the depreciation will result in a tax, because he takes the position that if he has any

cause to reopen the return to make any adjustment which might result in a tax, he is not bound by the inferred allowance of the deductions from the previous acceptance of the return, and may disallow the excessive depreciation and thus increase the tax.<sup>3</sup>

He does not seem at all disturbed by the inconsistency between his position that he need not treat the deduction as having been allowed if he can levy a tax thereby, and his position that he must treat the deduction as having been conclusively allowed if he can injure the taxpayer thereby.

The District Court, too, in sustaining the Commissioner, construed the *Virginian Hotel Corporation* decision as holding that the acceptance of a return is conclusive against the taxpayer. The District Court seemed to think that even the Commissioner was foreclosed from correcting the erroneous deduction. The District Court concluded:

“Disclosure of the excessive depreciation claimed and disallowance of its deduction by Revenue Agents or by the Commissioner does not authorize the latter to rectify the taxpayer’s mistake or error of judgment. I am unable to perceive any basis for a different conclusion in this case from that enunciated in the *Virginian Hotel Corporation* case, *infra*.” (R. 112.)

We respectfully submit that this conclusion is induced by a misconstruction of the *Virginian Hotel*

---

<sup>3</sup>R. 30, Stip. ¶ 6a; this actually happened in this case when the agents of the Commissioner reopened the year 1936 return after it had been “accepted”. See also I.T. 2944, *infra* p. 45, footnote.

*Corporation* decision and is not in accord with the pertinent income tax laws which prescribe the type and amount of deductions *which may be taken or allowed* on an income tax return.

Both the Commissioner and the District Court give no significance to the reference several times made by the Supreme Court in the *Virginian Hotel Corporation* decision to the lack of challenge by the Commissioner or his agents, of the claimed deduction. At the very beginning of its opinion the Supreme Court stated "No objection was taken by the Commissioner or his agents to the amounts claimed and deducted." In the portion of the Court's opinion quoted above (*supra*, p. 37) appear the statements—"deductions stand if the Commissioner takes no steps to challenge them," and "if the deductions are not challenged; they certainly are 'allowed' \* \* \*". The Commissioner and the District Court extend the decision as though the Supreme Court intended it to apply whether or not the deductions had been challenged. It is respectfully submitted that since the Supreme Court deemed it important to specifically qualify its decision by limiting it to instances where the claimed deductions had not been challenged by the Commissioner, the decision is inapplicable to a case, such as the instant case, where the claimed deductions were challenged. The decision is absolutely silent as to the status of an erroneous deduction once it has been challenged. The limited nature of the issue and the limited record before the Supreme Court precluded any consideration of the answer in such a situation (see Appendix hereof).

We can accept the *Virginian Hotel Corporation* decision for the proposition that the mere fact that the excessive depreciation deducted in the prior years did not result in tax benefit, does not mean that the deduction was not allowed. But the answer to the question in this proceeding of whether the challenged excessive depreciation deduction was allowed, and whether the excessive deduction could be corrected, must be determined from all the facts in the case and the applicable statutory provisions independent of the Supreme Court decision in the *Virginian Hotel Corporation* case which as we have just demonstrated does not apply where the prior year depreciation was challenged by the Commissioner or his Agents.

---

## II.

THE LEGISLATIVE PURPOSE OF PERMITTING THE BASIS TO BE REDUCED BY ALLOWED DEPRECIATION, WAS TO AUTHORIZE THE APPLICATION OF THE DOCTRINE OF ESTOPPEL AGAINST TAXPAYERS SEEKING TO CHANGE THE DEPRECIATION DEDUCTION WHERE TO PERMIT SUCH CHANGE WOULD LEAD TO INEQUITABLE RESULTS. THE STATUTE WAS NOT INTENDED AS AUTHORITY FOR THE ALLOWANCE OF AN ILLEGAL DEDUCTION TO ACCOMPLISH AN INEQUITABLE RESULT AGAINST THE TAXPAYER.

- (a) Legislative history of Section 113(b)(1)(B) shows that the legislature intended that retroactive adjustments of depreciation should be made where necessary to correct errors and to protect the interests of the taxpayer.

The basis for determining gain or loss on the sale or exchange of property, if acquired after February 28, 1913, is its cost, adjusted as in subsection (b) of



Section 113 of the Code. The basis for determining the amount of the deduction for depreciation is the same. (Section 114(a) of the Internal Revenue Code.)

The present law, subsection (B), as amended in the Revenue Act of 1932, requires the adjustment to the basis:

“(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws.”

The earliest provisions in the Revenue Acts with respect to the adjustment to the basis for depreciation and similar deductions is in Section 202(b) of the Revenue Act of 1924, that proper adjustment be made for the deductions previously “allowed”.<sup>4</sup>

The then Solicitor of the Bureau of Internal Revenue construed the word “allowed” in Section 202(b)

---

<sup>4</sup>The earlier Revenue Acts (prior to 1924) contained no provision similar to subsection (B). The adjustment to the basis of property was, however, made the subject of Treasury Department regulations, the validity of which was being contested (*United States v. Ludley*, 274 U. S. 295) when the Revenue Act of 1924 was under consideration and the following provision was made a part of section 202(b):

“In computing the amount of gain or loss under subdivision (a) proper adjustment shall be made for \* \* \* exhaustion, wear and tear, obsolescence, amortization, or depletion, previously allowed with respect to such property.”

The Committee on Ways and Means stated that the above provision was substantially the same as the then existing Treasury regulations. Report No. 179, 68th Cong., 1st Sess., page 12. The existing regulations were in Article 1561 of Regulations 45 and 62, and provided:

“\* \* \* proper adjustment must be made for any depreciation or depletion *sustained*.”

of the 1924 Act to mean "actually granted". In his Memorandum 4249<sup>5</sup> he stated that the subsection "contemplates an adjustment to the 'basis' only for deductions which have in prior years been actually granted by the Commissioner in computing the net income of the taxpayer."

The Treasury Department found that the 1924 Act did not provide for an adjustment in the case of property acquired prior to March 1, 1913, for depreciation sustained prior to that date; and Section 202(b) was amended by the Revenue Act of 1926 to provide that adjustment be made for the deductions previously "allowable"<sup>6</sup>. Section 202(b) of the 1926 Act was made Section 111(b)(2) of the Revenue Act of 1928.

The Treasury Department soon found fault with Section 111(b)(2), because there were instances of taxpayers who, in prior years, had deducted from income more depreciation than was allowable, and these taxpayers, in later years, asked that the deduction be reduced to the amount allowable, at a time when it was too late for the Government to collect

---

<sup>5</sup>Cum. Bul. IV-2, 1925, page 15.

<sup>6</sup>In the Revenue Act of 1926, the subsection was amended to read: "The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion which have since the acquisition of the property been allowable in respect of such property under this Act or prior income tax laws." In Senate Report 52, Senate Finance Committee, 69th Congress, 1st Session, it is stated: "The bill as passed by the House provides that the cost or March 1, 1913 value in the case of a sale shall be reduced by the amount of depreciation or depletion allowable under prior income tax acts in computing the gain subject to tax. It is believed that the rule stated by the House bill is the correct rule and that all taxpayers should be required to take proper annual deductions for depreciation and depletion."

the additional tax that might be due on the resulting increase to income in the prior years. This led to the 1932 amendment to specifically preclude the possibility that a taxpayer might claim the same depreciation deduction a second time and after the Government might be barred by the Statute of Limitations from collecting the tax that would be due for the year in which the deduction was first claimed. *The purpose was to protect the Government from loss of tax in a barred year—not to prejudice the taxpayer who would owe no tax.* The legislative intent is well stated in the Committee report<sup>7</sup> in the following sentences:

“In subparagraph (B), relating to depreciation, etc. for the period since February 28, 1913, the bill requires that adjustment be made to the extent allowed (but not less than the amount allowable) instead of by the amount \* \* \* allowable as in the prior act. The Treasury has frequently encountered cases where a taxpayer, who has taken and been allowed depreciation deductions at a certain rate consistently over a period of years, later finds it to his advantage to claim that the allowances so made to him were excessive and that the amounts which were in fact allowable were much less. By this time the Government may be barred from collecting the additional taxes which would be due for the prior years upon the strength of the taxpayer's present contentions. The Treasury is obliged to rely very largely upon the good faith and judgment of the taxpayer in the determination of the allowances for deprecia-

---

<sup>7</sup>Report No. 708 of the Committee on Ways and Means, 72d Cong., 1st Sess., page 22, repeated in Senate Report No. 665, same session, page 29.

tion, since these are primarily matters of judgment and are governed by facts particularly within the knowledge of the taxpayer, and the Treasury should not be penalized for having approved the taxpayer's deductions. While the committee does not regard the existing law as countenancing any such inequitable results, it believes the new bill should specifically preclude any such possibility."

The Senate Finance Committee in its report added the following very enlightening statement:

"Your committee has not thought it necessary to include any express provision against retroactive adjustments of depreciation on the part of the Treasury as the regulations of the Treasury seem adequate to protect the interests of taxpayer in such cases. These regulations require the depreciation allowances to be made from year to year in accordance with the then known facts and do not permit a retroactive change in these allowances by reason of the facts developed or ascertained after the years for which such allowances are made."<sup>8</sup>

It seems obvious that the legislature though prohibiting a retroactive adjustment of depreciation in order to protect the Government against inequitable claims, intended specifically to recognize the right to make a retroactive adjustment where such an adjustment was required to "protect the interests of the taxpayer". Since the legislature expressly stated it

---

<sup>8</sup>Treasury Regulations 74, Articles 205 and 561 (substantially similar to Articles 23(1)5 and 113(b)1, *supra* pages ..... and .....).



was not making provision against retroactive adjustments it certainly did not intend that the law should be so administered that the Commissioner could refuse to make a retroactive adjustment to the prejudice of the taxpayer or that the Commissioner could conclusively bind the taxpayer to an error. *The Legislature seemed satisfied with the existing Act requiring an adjustment of cost for "allowable" depreciation excepting only in those instances where to ignore the amount of depreciation actually allowed would result in the inequity described in the Committee reports.*

In 1935, the Commissioner issued I. T. 2944, Cum. Bul. XIV-2, page 126,<sup>9</sup> and therein stated:

---

<sup>9</sup>I.T. 2944, Cum. Bul. XIV-2 (1935), p. 126:

"Advice is requested whether the deduction for depreciation claimed on an income tax return which has been accepted by the Bureau constitutes depreciation 'allowed' for the purpose of adjusting the basis to be used in computing gain or loss, depreciation, exhaustion, or obsolescence in subsequent years controlled by the Revenue Acts of 1932 and 1934.

"Sections 113(b) and 114(a) of the Revenue Acts of 1932 and 1934 in effect provide that the basis for such purposes shall be adjusted for exhaustion, wear and tear, and obsolescence to the extent allowed (but not less than the amount allowable) for any period since February 28, 1913. The word 'allowable' designates the amount permitted or granted by the statutes, as distinguished from the word 'allowed' which refers to the deduction actually permitted or granted by the Bureau. The amount 'allowable' is the minimum for adjustment purposes, the amount 'allowed' serving to measure the adjustment only when the amount thereof exceeds that allowable.

"It follows that the depreciation claimed as a deduction in a return which has been accepted by the Bureau is the amount 'allowed' for that year. The amount 'allowed' for any year may be adjusted to the amount 'allowable' at any time within the statutory period applicable thereto for purposes of computing the proper deduction for such year and of adjusting the basis. The statute, however, requires adjustment of the basis to accord with the amount 'allowed' or the amount 'allowable', whichever is greater, irrespective of any statute of limitations applicable to the year of deduction."

“It follows that the depreciation claimed as a deduction in a return which has been accepted by the Bureau is the amount ‘allowed’ for the year.”

There was no explanation in this ruling of what was intended to be meant by the word “accepted”.

In such manner was the meaning of the word “allowed” changed from “actually granted by the Commissioner in computing the net income of the taxpayer”, as in the Solicitor’s 1925 Memorandum 4249, Cum. Bull. IV-2, page 15, to “claimed as a deduction in a return which had been accepted by the Bureau”, as in the 1935 Income Tax ruling. The next step was the ruling made in this case and sustained by the District Court, that *any return filed*, whether or not audited or corrected by the Commissioner or his agents, *is accepted*, and as against the taxpayer the depreciation taken thereon is automatically and conclusively allowed whether right or wrong.<sup>10</sup> This position is in direct violation of the expressed intention of the Legislature that there should be no prohibition against retroactive adjustments and that the interests of the taxpayer should be protected. It was only in cases where the Government’s interest would be prejudiced *by the loss of tax* through the bar of the statute of limitations, or where an adjustment was indicated only by after-discovered facts, that retroactive adjustments were to be prohibited. In directing attention to the

---

<sup>10</sup>The District Court seemed of the opinion that even the Commissioner could not correct the erroneous deduction, the Court stating: “Disclosure of the excessive depreciation claimed and disallowance of its deduction by Revenue Agents or by the Commissioner does not authorize the latter to rectify the taxpayer’s mistake or error of judgment” (R. 112).

Commissioner's regulations which permit of retroactive adjustment in the case where the depreciation was in error based upon the facts known at the time the depreciation was deducted (*supra*, p. 44), the Legislature acknowledged that retroactive adjustments might be made in such cases especially where necessary to reflect the proper allowable depreciation and to protect the interests of the taxpayer. That is exactly the type of case which is before this Court in this proceeding. The decision of the District Court to the effect that the erroneous deduction taken on the original returns for 1932 to 1935 could not be corrected even though known to be erroneous at the time deducted on the basis of facts then known, is directly in conflict with the legislative intent as to the purpose of Section 113(b)(1)(B) and as to the manner in which it should be administered.

In summary, we conclude from the foregoing analysis that the legislative history of Section 113(b)(1)(B) shows that the legislature was convinced that the correct rule for reducing the cost by depreciation was (1) that it should be reduced by depreciation "allowable in respect of such property under this Act or prior income tax laws" (footnote 6, p. 42, *supra*); (2) that retroactive adjustment of the depreciation taken on the return should not be made where the depreciation was not challenged by the Commissioner and any adjustment would result in the allowance of an inequitable claim against the Government, or where the adjustment could be supported only by facts developed or ascertained after the years for which the depreciation was taken, in which cases the depreciation taken

would be considered to be "allowed" and would take the place of the amount allowable; and (3) that retroactive adjustment should be made where it is necessary to correct an error in the depreciation on the basis of facts known at the time, to protect the interests of the taxpayer, and to avoid inequities, especially where the depreciation was challenged by the Commissioner or his agents.

There is nothing in the *Virginian Hotel Corporation* case in conflict with the above-stated conclusions as to the legislative intent as to the purpose of Section 113(b)(1)(B) and the manner in which it should be administered. The Supreme Court examined the legislative intent only to the extent necessary to determine how Section 113(b)(1)(B) should be applied in the instance where depreciation taken on a prior year return was *never* challenged by the Commissioner or his agents, and where no tax benefit was derived from the deduction. We believe that our conclusion (2) in the previous paragraph hereof is consistent with the Court's decision as to the legislative intent as applicable to that single situation. The Court had no occasion to extend its decision to the determination of the legislative intent as applicable to factual situations similar to those existing in the instant case as, for example, where the depreciation had been challenged by the Commissioner or his agents, and our conclusions (1) and (3) as to the legislative intent as applicable to those situations relate to matters not decided or considered in the *Virginian Hotel Corporation* case.



There is no question that if the conclusions hereinbefore stated as to the legislative intent are correct, the appellant's position in this case that the erroneous depreciation taken in the years 1932 to 1935 and challenged by the Commissioner, should be corrected, is sound and should be sustained, and the decision of the District Court to the effect that no retroactive adjustment could be made under the law, should be reversed.

We have made mention several times of the apparent intention of the Legislature that the only purpose of the 1932 amendment of Section 113(b)(1)(B) was to prevent inequities against the Government, and we have emphasized that the Legislature intended that the interests of the taxpayer, too, should be protected against inequitable results. The District Court was not impressed with the equities in this case concluding "It is not unfair nor unjust to compel such a taxpayer to accept the consequences of such procedure, even though, as presently asserted, the motive was not ulterior, but that the procedure was a mistake". We think the Court's view is much too severe. It seems to us to be most unfair to deny to the taxpayer the right to correct a mistake which, unless corrected, will cost the taxpayer \$600,000. There are so many circumstances which, we think, justify the conclusion that the taxpayer's position in this proceeding is fair, equitable, and just, that a brief statement of them should be submitted before concluding this section of the Argument, so we submit the following to point out that unless the equities of the taxpayer's position are recognized, Section 113(b)(1)(B) will be given effect

in a manner contrary to the intention of Congress as to the purposes to be accomplished by the section.

**(b) The application of Section 113(b)(1)(B) in the manner in which it was applied by the Commissioner in this case is unjust and inequitable and contrary to the intention of Congress as to the purposes to be accomplished by the section.**

It is true that the matter of equity cannot in itself be the basis for the determination of a strictly legal question. But the matter of equities, good faith, and plain justice should have its influence as a check upon whether a statute is being properly construed or applied within the intention of the legislature which enacted it. This is especially true here where as hereinabove pointed out, the Congress at the time it passed this statute was thinking of accomplishing equitable results and protecting the interests of the taxpayer as well as the interests of the Government. The purpose of the statute was to assure equitable results, not to impose inequitable results or injury upon taxpayers.

The Congressional Committees had in mind two types of cases in which retroactive adjustments of the depreciation allowance would be inequitable and would be prohibited by the amendment of Section 113(b)(1)(B), in order to protect the interests of the Government:

(1) Where the adjustment would result in an additional tax which would be barred from collection.

(2) Where the adjustment would be based upon facts developed or ascertained in later years.

This case does not fall within either of these classes. The correction of the depreciation in this case does not result in any additional taxes; and the correction is not based upon a later discovery of facts but upon facts stipulated as being known at the time the deductions were taken.

The Senate Finance Committee thought that retroactive adjustments of the depreciation allowance could be made in other cases "to protect the interests of the taxpayer in such cases". In this case, retroactive correction of the depreciation allowance for the years 1932 to 1935 should be made to protect the interests of the taxpayer.

The Government was on notice at all times after the filing of the returns for 1932 to 1935 that there was something wrong about the depreciation deduction taken on the return. The Government agents who examined the returns confirmed this and corrected the errors. The corrections were set forth in amended returns. There was no tax liability so there was no tax barred from collection. These facts and other facts hereinafter described relating to the original reporting of the erroneous deductions and the appellant's efforts to correct the error negative any idea that the appellant is making an unfair or inequitable claim in this case.

The appellant's employees took certain depreciation deductions on the tax returns for the years 1932 to 1935, inclusive, knowing at the time that the deductions were wrong (R. 62, Stip. ¶ 31c). The appellant's

administrative officials, though signing the returns, did not know this but assumed that the returns were properly prepared (R. 67, Stip. ¶ 33). Technically, the negligence or mistake of its employees in preparing these returns may be imputed to the appellant but the practicalities which are common to any large organizations having departmentalized functions should be recognized.

The taxpayer's tax department, its accounting department, and its head office or executive department were located in different buildings (R. 62, Stip. ¶ 31c). Each performed certain functions reflected in the preparation of the tax return. The tax return was extremely complicated and book items of income and deductions were so reclassified and summarized when transcribed upon the return that it was impossible from a mere inspection of the return to identify the book items (R. 61, Stip. ¶ 31a). The returns showed large net losses and no income tax liability (R. 44, Stip. ¶ 12, 13). Under these circumstances it was only reasonable conduct for the administrative officials of the appellant to assume, without investigation, that the return was correctly prepared and to sign the return. Nevertheless the stipulations show that the returns were not correctly prepared and that the employees who prepared them knew that they were not correctly prepared but thought that they could be corrected at any time (R. 62, Stip. ¶ 31c). So, aside from the legal point hereinafter further argued that an illegal deduction whether or not taken by mistake, cannot be "allowed", as a matter of equity this appellant should



not be so shackled by the errors of its employees that it should have no opportunity to correct those errors. It would be most inequitable to so construe or administer the statute as to impose unconscionable taxes upon the premise of refusing this appellant the right to correct mistakes. The Legislature was of the opinion that Treasury Regulations permitted retroactive corrections in such a case (*supra*, p. 44). We do not believe that Congress ever contemplated that taxpayers must be infallible or suffer the consequences of their mistakes.

Just what does this situation mean to this appellant? The accumulated error in taking excessive depreciation in the original returns for the years 1932 to 1935, inclusive, results in the reduction of the basis for depreciation as of December 31, 1935 of approximately \$2,000,000. Had the returns been properly prepared the appellant would have had additional capital investment of \$2,000,000 *properly* recoverable through depreciation allowances in later years (as to furniture and fixtures, 12 years, and as to buildings, a longer period). If an average effective tax rate of 30% over the period in which this \$2,000,000 should be recoverable is assumed, it is obvious that there is a tax of around \$600,000 which the Commissioner by his position in this case is, we contend, inequitably exacting from appellant. In other words the construction of the statute in such manner as to preclude appellant from correcting conceded errors, will result in the exaction of a tax of \$600,000 which admittedly would not be due if the conceded errors were corrected. In

this connection we think the remark made by the Circuit Court of Appeals for the Fifth Circuit in its decision in the case of *Anna I. Hilpert v. Commissioner* (1945), 151 F. (2d) 929, is most appropriate:

“The appetite for taxes is not so voracious, the commands of the statute are not so inexorable, as to require the doing of an injustice when there is another course that is more fully consonant with law and reason and which course, if followed, will lead neither to evasion by the taxpayer nor extortion by the Government.”

As a further matter of equity, appellant should not be so prejudiced by the Commissioner's income tax departmental procedure and practices that it cannot be relieved of this substantial and unfair tax burden. The stipulations show that appellant has been trying for nine years to obtain a correction of the mistake in its report of depreciation on its tax returns for the years 1932 to 1935; that since January, 1937, it has been constantly and consistently asking the Government to make the correction or cooperate with it in establishing a mutually acceptable basis for the correction (R. 63, Stip. ¶ 32); that for several years the Government agents, though admitting that a mistake existed and should be corrected, refused to correct it or to help the appellant in making proper corrections because to do so would violate an office practice or rule that no time or work should be devoted to a case unless a tax liability was involved (R. 50, Stip. ¶ 19-20). True, the appellant could have filed amended returns sooner than it did but those returns were not neces-

sary so long as there was a possibility that the depreciation could be adjusted and settled with the Government agents which in fact was actually accomplished even though the reports of the agents were later rejected by the Bureau of Internal Revenue at Washington, D. C. When it became necessary to file the amended tax returns for the years 1932 to 1935, the appellant filed them, correcting therein the depreciation reported on the original returns (R. 67, Stip. ¶32i). Even on the basis of the amended returns there was no tax liability for those years. The interests of the Government were not jeopardized in the slightest by the delay in filing amended returns. The returns did nothing more than present on a return form what the appellant had been presenting to the Commissioner in other ways for almost nine years.

The Bureau's position could well be stated to be that the depreciation was allowed because under its procedure the Bureau could not take time to correct it, even though knowing it to be wrong; and since it was allowed in that manner it thereby became a correct deduction which the taxpayer is forever precluded from questioning no matter how illegal the deduction or how unfair, unjust or harsh the burden resulting from such allowance. There can be little question that such a position is most inequitable if not illegal, and most prejudicial to the interests of the taxpayer. The Government is applying the statute to justify the Commissioner in the very wrong the statute was intended to correct. The statute condones the allowance of an illegal deduction where in doing so an inequitable

result is prevented; the Commissioner cites it as justification for allowing an illegal deduction where in doing so an inequitable result is accomplished.

The Government's position means that no matter how erroneous or excessive is the deduction, and no matter how well informed the Commissioner might be that the deduction is erroneous, the Commissioner alone has the exclusive right to correct the deduction. He can correct it if by doing so he can collect more taxes; he can refuse to correct it if by doing so he can collect more taxes. The rights of the taxpayer are completely ignored in this picture and the taxpayer is bound by a mistake even to the extent of being deprived of any right or means of correcting the mistake, and being forced to suffer the consequences of an illegal deduction even though the legal and equitable rights of the Government were not prejudiced by the taxpayer's mistake and would not be prejudiced by a correction of the mistake. This result is directly in conflict with the legislative purpose of Section 113(b)(1)(B) to effect equitable results.

It is respectfully urged that the Congress when enacting Section 113(b)(1)(B) intended only to codify the principle of estoppel in its application to cases where the correction of an error in the depreciation would lead to inequitable results (see *supra*, p. 43). In no other instance is there any statutory authority for the allowance of an illegal deduction, and, as will hereinafter be further argued, an illegal deduction for depreciation cannot be allowed where the correction of that deduction will not lead to inequitable results.



The Legislature intended, expressly, that retroactive corrections of the depreciation should be made where necessary to protect the interests of the taxpayer as well as the interests of the Government.

It is true that in the *Virginian Hotel Corporation* case the Supreme Court held that the acceptance of prior year returns effected an allowance of the depreciation taken thereon under circumstances where there were no grounds for estoppel to prevent the taxpayer from requesting a correction of that depreciation. But, as pointed out in the appendix hereof there was no evidence in that case that a retroactive correction of the prior year depreciation was in order because the Supreme Court emphasized that the Commissioner had never challenged or objected to that depreciation; and the extremely limited nature of the issue prosecuted and decided in that case did not in itself indicate that the result of the Commissioner's action, sustained by the Supreme Court, was inequitable. There is nothing in the *Virginian Hotel Corporation* case in conflict with the conclusions herein expressed as to the legislative intention as to the purposes of Section 113(b) (1)(B).

The facts in the instant case show quite clearly as hereinbefore described that the action of the Commissioner approved by the District Court results in hardship and inequities, and in conclusions contrary to the intention of the Legislature as to the purposes to be accomplished by Section 113(b) (1)(B).

## III.

NO ADJUSTMENT CAN BE MADE UNDER SECTION 113(b)(1)(B) FOR AN ILLEGAL DEPRECIATION DEDUCTION WHICH THE COMMISSIONER NEVER HAD AUTHORITY TO ALLOW AND THEREFORE COULD NOT ALLOW, UNLESS UNDER THE DOCTRINE OF ESTOPPEL THE TAXPAYER IS ESTOPPED FROM CONTENDING THAT THE DEDUCTION WAS ILLEGAL AND HAD NOT BEEN ALLOWED. IN THIS CASE APPELLANT IS NOT ESTOPPED FROM MAKING SUCH CONTENTIONS.

- (a) When the Commissioner found that appellant's depreciation for the years 1932 to 1935 was erroneous and not allowable under the statute authorizing the deduction, he had no authority to allow the deduction either affirmatively or constructively.

Section 113 (b)(1)(B) provides that the base of depreciable property is to be reduced by depreciation "to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws". The Commissioner contends that by accepting Appellant's returns for the years 1932 to 1935 inclusive, the depreciation taken thereon was "allowed" within the meaning of the above section. It must follow that the Commissioner contends that by accepting the returns for 1932 to 1935 he allowed the depreciation taken thereon under the Income Tax Acts of 1932 and 1934 which were applicable to those years. The authority for the allowance of the depreciation deduction for those years is contained not in Section 113 which relates solely to the basis for depreciation (or for gain or loss), but in Section 23 of those Acts (23(k) of the 1932 Act and 23(l) of the 1934 Act) which provides that there shall be allowed as a deduction "a reasonable allowance for the exhaustion, wear

and tear of property used in the trade or business, including a reasonable allowance for obsolescence''. A depreciation deduction must come within this statutory provisions to be allowable. *The Commissioner has no authority to allow any deduction which does not come within the statutory provision.*

The United States Supreme Court stated in the case of *New Colonial Ice Co. v. Helvering* (1934), 292 U. S. 435, 54 Sup. Ct. 788, 78 L. Ed. 1348, 13 A.F.T.R. 1180:

“Whether and to what extent deductions shall be allowed depends upon legislative grace, and only as there is clear provision therefor can any particular deduction be allowed.”

This rule was applied to depreciation in the case *Jefferson v. Clearfield, Coal & Iron Co. v. U. S. Court of Claims*, 1936, 14 Fed. Supp. 918, 17 A.F.T.R. 871, certiorari denied, where the Court held that deductions from gross income for exhaustion of wasting assets, depletion or depreciation may be taken by the taxpayer only in the amount allowed *by the statute*.

The Commissioner may allow a deduction not knowing that it did not come within the statutory provision, but if he knows as in this case, that a deduction has been taken which is not allowable under the statute, he cannot allow the deduction in contravention of the statute. Neither can he arbitrarily allow, or have the right to elect to allow, a deduction for which there is no authority in the Statute; if he tried to exercise such authority he would be exercising legislative

power which would be a usurpation of the powers of Congress. This rule cannot be affected by regulation or practice of the Commissioner of Internal Revenue. It is a recognized principle that:

“The power of an administrative officer or board is to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.”  
*Lynch v. Tilden* (1924), 265 U. S. 315, 320-322, 44 S. Ct. 488, 4 A.F.T.R. 3980.

After the Internal Revenue Agents challenged the depreciation deductions taken by Appellant on its original returns for the years 1932-1935, and corrected them, the Commissioner had no right to repudiate or disavow the acts of his agents. He may reject the conclusions of his agents but he cannot escape the imputation of the facts discovered by them and he cannot ignore those facts to justify a conclusion not sustainable on the basis of these facts. The facts divulged to and verified by the Agents are stipulated as true in this proceeding. Under those facts there could be no other conclusion than that the depreciation taken in the years 1932 to 1935 was excessive under conditions known at that time and the Commissioner was thereupon bound to make a determination of the cor-



rect depreciation allowable under the Statute.<sup>11</sup> His ruling in this case resulted in a determination not authorized by Statute and in the "allowance" of a depreciation deduction which violated the Statute. (Section 23). The Commissioner cannot invade the field of legislation and make an "allowance" not authorized by Statute. It was his duty and obligation to make a determination and an allowance of depreciation in accordance with the Statute. (*Commissioner v. Van Vorst* (CCA.-9, 1932), 59 Fed. (2d) 677, 11 A.F.T.R. 562). With knowledge of the facts as to Appellant's depreciation and the mistake on its original returns for the years 1932 to 1935, there was only one determination which the Commissioner could have made to be within the requirements of the income tax laws, and that was to do what his agents did, to ascertain and allow the correct depreciation allowable for those years under the Statutes applicable thereto.

The principle against permitting the Commissioner to use his own discretion about strict compliance with the Statute was also applied in the case of *F.H.E. Oil Co. v. Commissioner* (C.C.A.-5, 1945), 147 F. (2d) 1002, holding invalid a Treasury regulation granting taxpayers the option to expense intangible costs of drilling oil wells, on the ground that such costs were

---

<sup>11</sup>Senate Report No. 665, 72d Cong., 1st Sess., supra p. 43.

Regulations 101, Article 23(1)5, supra p. 23:

"The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made."

*Com. v. Mutual Fertilizer Co.* (C.C.A.-5, 1947), 159 F. (2d) 470;

*Com. v. Cleveland Adolph Mayer Realty Corp.* (C.C.A.-6, 1947), 160 F. (2d) 1012.

capital expenditures and the Commissioner had no authority to allow them as deductions; also in the cases of *Central Real Estate Co. v. Commissioner*, (C.C.A.-5, 1931), 47 F. (2d) 1036, 9 A.F.T.R. 1056, and *H. M. O. Lumber Co. v. Commissioner* (C.C.A.-6, 1932), 59 F. (2d) 907, 11 A.F.T.R. 614, holding the Commissioner could not allow an option for treating carrying charges as capital additions or as expense since such items were not capital items under the statute.

It is obvious that under the circumstances of this case, the Commissioner would be prohibited from *affirmatively* allowing a depreciation deduction which he knew was not authorized by Statute—it must necessarily follow that he cannot *constructively* allow it by doing nothing or by accepting the return on which it is reported. Once the deduction is recognized as an illegal deduction there is nothing in the Statute which would permit it to be allowed under any circumstance, and as will hereinafter be pointed out, Appellant is not estopped from making and relying upon this contention.

In this case, when the Commissioner and his agents learned that the depreciation taken on the original returns for the years 1932 to 1935 were not allowable under the only section of the income tax laws (Sec. 23) which authorized the deduction, the Commissioner was without power to allow that deduction either affirmatively or constructively. He cannot compel an incorrect return (*Wheelock v. Commissioner*, 28 B.T. A. 611). He had no power to allow the deduction by

accepting the incorrect return—therefore he cannot say at a later date that by accepting the return he allowed the deduction.

The view of the District Court in this case that the Commissioner cannot change a taxpayer's mistake in claiming an illegal deduction and must therefore be deemed to have "allowed" this deduction is absolutely contrary to the authorities just hereinbefore cited. Under these authorities it is clear that the Commissioner may act only as permitted by law and may allow only such deductions as are authorized by the Statute, and it is clear too that the taxpayer may take or be allowed only such deductions as are allowed by the Statute. There is absolutely no authority for the taking or for the allowance of a deduction on an income tax return unless that deduction is specifically authorized by the income tax laws<sup>12</sup>.

---

<sup>12</sup>*Merten's Law of Federal Income Taxation* (a text published by Callaghan & Co., Chicago) : Vol. 1, p. 69, Sec. 3.08—"Construction of Deduction and Privilege Provisions—The rule that ambiguities must be resolved in favor of the taxpayer is likewise inapplicable to deduction provisions of taxing acts. Deductions, like exemptions, are privileges, and must be narrowly construed. They will be allowed only when granted by clear language. The burden is on the taxpayer to show that he comes within the terms of the Statute granting the privilege. The general rule here discussed is often expressed as follows: 'Deductions are a matter of legislative grace.' " P. 89, Sec. 3.21—"The Commissioner may not make an arbitrary or unreasonable regulation, nor can the Treasury Department repeal or enlarge the scope of a Statute, supply a supposed omission, create an exemption, limit any rights thereunder, nullify a prior judicial construction of the Statute, alter or amend it in any way, particularly where an income tax might be so converted into a capital levy."

Vol. 4, p. 4, Sec. 23.01—"One of the familiar deductions to taxpayers is the deduction provided for 'depreciation' \* \* \* The allowance, like all other deductions, is a matter of legislative grace \* \* \*" (Extensive citations referred to in the text in support of the above statements are here omitted).

(b) Appellant is not estopped from correcting the erroneous deduction or from contending that the deduction was illegal and had not or could not have been allowed.

If an illegal deduction had been allowed in such a manner that the taxpayer had obtained a benefit therefrom, and later the taxpayer finds it to his advantage to make claim for a correction of the deduction at a time when the Government would be barred from collecting any additional tax which might result from the correction, then the taxpayer would be estopped from contending that the deduction was illegal.<sup>13</sup> It appears from the legislative history of Section 113 (b)(1)(B)<sup>14</sup> that Congress intended by its use of the word "allowed" to recognize this principle of estoppel,

---

<sup>13</sup>*Robinson, Exec. v. Comm.*, 100 F. (2d) 847 (C.C.A.-6, 1939), certiorari denied.

"Equitable estoppel applies in tax cases when the following correlative facts are present: The taxpayer, by his conduct, which includes language, acts or silence knowingly makes a representation or conceals material facts which he intends or expects will be acted upon by taxing officials in determining his tax, and the true or concealed material facts are unknown to the taxing officials or they lack equal means of knowledge with the taxpayer, and act on his representation or concealment and to retrace their steps on a different state of facts would cause the loss of taxes to the Government. A weighty factor in determining the application of the principle is the availability of the necessary facts to the parties involved."

*Berch v. U. S.* (Ct. Cl. 3/6/44), 54 F. Supp. 175, 32 A.F.T.R. 581;

*Clifton Mfg. Co. v. Comm.* (C.C.A.-4, 1943), 137 F. (2d) 290, 31 A.F.T.R. 386, rev'g. 1 T.C. 71;

*John Milton*, 33 B.T.A. 4;

*Stern Bros. v. U. S.*, 8 F. Supp. 705, Ct. Cls. 1934, 14 A.F.T.R. 987;

*R. H. Stearns Co. v. U. S.*, 291 U. S. 54, 54 S. Ct. 325, 13 A.F.T.R. 842;

*Tidewater Oil Co.* (1934), 29 B.T.A. 1208;

*Mrs. R. Z. Wheelock*, 28 B.T.A. 611, aff'd C.C.A.-5, 1935, 77 F. (2d) 474, 16 A.F.T.R. 109.

<sup>14</sup>*Supra*, pp. 40 to 57.



and to classify any depreciation which could not be disturbed under that principle as allowed depreciation which should be taken from the basis of the property to determine the remaining or unexhausted base. But that is not the situation in this case. Appellant is not trying to take advantage of the Government or escape a tax. As hereinbefore pointed out, Appellant's position in this case is equitable and just, and the factors which justify the application of equitable estoppel are not present in this case.

In summary, depreciation can be said to be allowed (1) if in the adjustment of a tax liability the Commissioner affirmatively allows certain depreciation, or (2) if the depreciation was considered in the computation of a tax liability and the taxpayer is estopped from claiming it to have been erroneous, or (3) if the depreciation had never been challenged or objected to by the Commissioner or his agents and the return on which it was deducted was accepted.

Depreciation cannot be said to have been allowed if (a) it was not allowable under the law authorizing the deduction, (b) the Commissioner knew it to be erroneous, and (c) no tax benefit was derived therefrom, regardless of whether or not the return was accepted, because as hereinabove pointed out the Commissioner has no authority under such circumstances to allow the erroneous deduction. The instant case falls exactly within this category. For the purposes of Section 113 (b)(1)(B) any such depreciation must be corrected and it should be presumed that the Commissioner allowed, or the Commissioner should be required to

allow only the allowable portion thereof<sup>15</sup>, and therefore only the correct depreciation deduction should be taken from the basis of the property in determining the remaining or unexhausted basis of said property as of a later date.

---

#### IV.

**THE REPORTING OF ERRONEOUS DEPRECIATION FOR THE YEARS 1932 TO 1935, INCLUSIVE, WAS A MISTAKE. UPON THE COMMISSIONER'S REFUSAL TO CORRECT THE MISTAKE THE APPELLANT SHOULD NOT HAVE BEEN DENIED THE RIGHT TO CORRECT IT.**

The record shows that in 1932 the appellant made a survey of its property as the result of which it made a new estimate of the life of the property and established revised depreciation rates and schedules, and it used these revised rates and schedules in computing the depreciation allowance recorded on its books and records for the years 1932 to 1935, inclusive (R. 57, Stip. ¶ 25). As to Furniture and Fixtures this allowance for depreciation recorded on the books for said years, is stipulated to be a reasonable allowance for depreciation (R. 58, Stip. ¶ 26a).

This stipulation establishes that the appellant's *books* reflected the correct depreciation for those years based on conditions then known to the appellant.

The appellant's employee who prepared the tax returns for those years did not report as a deduction

---

<sup>15</sup>The Legislature intended that the right to make retroactive adjustments to protect the interests of the taxpayer should be preserved, *supra* p. 44.

on the tax return, the depreciation written off on the books, but reported a very much larger amount (R. 46, Stip. ¶ 14, 15; R. 272). When he did this, he *then knew it was wrong* but he thought it would be corrected, and in any event that it could be corrected at any time (R. 62, Stip. ¶ 31c). When a newly engaged tax counsel for the appellant discovered the error early in 1937, he started active endeavors which extended over a period of eight years to effect such corrections of that error as would be satisfactory to the Commissioner of Internal Revenue (R. 63, Stip. ¶ 32). The stipulations establish quite clearly that the executive or administrative officials of the appellant who signed the returns did not know of the existence of this error, but they relied upon the tax department and assumed that the returns were being correctly prepared, and when they were told of the error, and told that all efforts to correct the error through audit of the returns by the Bureau of Internal Revenue had been futile, they executed amended returns for the Bank for the years 1932 to 1935, inclusive, to correct the error (R. 67, Stip. ¶ 33).

There can be no question that the record in this case establishes that the original returns for the years 1932 to 1935 contained an error or mistake in the depreciation taken thereon as a deduction. When such a mistake is made there are only two ways by which the mistake can be corrected; one, the audit and correction of the erroneous deduction by the representatives of the Commissioner of Internal Revenue, and two, the filing by the taxpayer of amended returns. The Com-

missioner refused to make the correction so the appellant was compelled to resort to the filing of the amended returns. It does not seem practical that under the facts in this case, the resort to the mere formality of filing an amended return would have been necessary to sustain appellant's position that a correction of errors should be made. However, the appellant did satisfy that formality and in a purely technical way it does have the effect of adding further strength to the appellant's position in this case.

The appellant did file amended returns for the years 1932 to 1935, correcting the error in the original returns. The Commissioner of Internal Revenue refused to consider them or give any effect to them (R. 37, Stip. ¶ 25), presumably because they were not filed until April, 1945. The delay in filing the amended returns is clearly explained in the stipulations and was not prejudicial to the Government since there was no tax liability for the years 1932 to 1935 even on the basis of the amended returns. The Bank's tax department thought they could be prepared at any time because no tax liability was involved, and its tax counsel not only was of the same opinion but was of the further opinion that the correction of the depreciation could be effected in the course of the audits of the tax returns for later years, thus making the filing of amended returns for the years 1932 to 1935 unnecessary (R. 60, Stip. ¶ 31, 32). *Treasury regulations require generally that the Government agents should advise the taxpayer as to the information to be submitted (Mim. 1470, C.B. XIII-1 p. 59, C.B. XV-2 p. 148) so*



*appellant had the right to expect cooperation from the Government agents in the preparation of mutually satisfactory depreciation schedules.* That there was good ground for appellant's opinion that the matter would be corrected is amply demonstrated by the fact that the correction was effected in the course of the audit of later year returns by the Government revenue agents and engineers, in negotiations which extended over a period of several years, and it was only because the Bureau of Internal Revenue in Washington, D. C. rejected the work of its agents in San Francisco that the correction was not given effect and that this Court proceeding had to be brought. As soon as the appellant had exhausted all means for securing an acceptance by the Bureau of Internal Revenue of the work of the Government agents in San Francisco, it filed the amended returns (R. 67, Stip. ¶ 32i). Under these circumstances there was no lack of diligence on the part of the appellant in its efforts to correct its errors or in the filing of the amended returns.

It is respectfully submitted that under the facts in this case, there is absolutely no justification for the Commissioner's position that appellant is conclusively bound by its mistake, and there is no justification for his refusal to consider or give effect to these amended returns, and the District Court was wrong in approving his actions. Appellant, as any other taxpayer, cannot be presumed to be infallible, especially in so complicated a matter as the preparation of income tax returns, and it should have the right to demand the correction of erroneous returns. As hereinbefore

pointed out (*supra* p. 47), the legislature when it enacted Section 113 (b)(1)(B) intended that the right to correct mistakes in the depreciation deduction should be recognized and preserved.

In the *Wheelock* case, 28 B.T.A. 611, the Board of Tax Appeals stated the rule as to the proper reporting of deductions and the correct computation of a tax liability as follows:

“The mere failure of a taxpayer to take the proper deduction in each year does not permit him to take advantage of his mistake through an incorrect return in a later year, *nor does it permit the Commissioner to compel an incorrect return.* The law does not contemplate the adjustment in any part of an incorrectly computed tax by the incorrect computation of another tax. Unless barred by the stature of limitations, a taxpayer is not precluded from demanding a correct computation of his tax for a past year on the facts as they exist, whether originally reported or not.” (*Italics ours*).

There is no question that the filing of amended returns is a recognized practice for correcting errors. In fact, there is no other way for a taxpayer to voluntarily correct a mistake in its original tax return and certainly it should be afforded an avenue for a lawful correction of a mistake. The Statute of Limitations relates to the assessment and collection of tax liability so there is no bar of the Statute of Limitations where, as in this case, there is no tax liability for the years for which amended returns are filed. The privilege of filing amended returns is well de-

scribed by the U. S. District Court for the District of Connecticut, in the case of *Milford Trust Co. v. United States*, decided October 31, 1945, 63 Fed. Supp. 618, as follows:

“During the years involved there was, to be sure, no statutory authority for the acceptance of amended returns. Such amendments have, however, been accepted by the Commissioner of Internal Revenue for the purpose of correcting errors. They are not forbidden by statute, as they were in the case of capital stock tax returns, 26 U.S.C. 1202(a). Amended income tax returns have frequently been accepted, at least in cases where there has been no election involved. *Pictorial Review Co. v. Helvering*, 68 F. (2d) 766, 13 A.F.T.R. 594; *Morrow, Becker & Ewing v. Commissioner*, 75 F. (2d) 1, 10 A.F.T.R. 1491. Errors of law as well as of fact may be corrected. Cf. *Richardson v. Commissioner*, 126 F. (2d) 462, 28 A.F.T.R. 1381. Here there was plain error in the 1934 return. The amendment was the plaintiff’s only method to correct that error. And if the correction indirectly had the effect of improving plaintiff’s tax position, that result was incidental only.”<sup>16</sup>

---

<sup>16</sup>Other authorities permitting or requiring the filing of amended returns are: O.D. 111 (1919) Treasury Department, Cum. Bul. 1, p. 224; O.D. 113 (1919) Treasury Department, Cum. Bul. 1, p. 234; Mim. 2207 (1919) Treasury Department Cum. Bul. 1, p. 221; O.D. 1131 (1921) Treasury Department, Cum. Bul. 5, p. 289; T.D. 3220 (1921) Treasury Department, Cum. Bul. 5, 285; I.T. 2090 (1924) Treasury Department, Cum. Bul. III-2, p. 163; *U. S. v. Smith* (Dist. Ct. La., 1926), 13 F. (2d) 923, 5 A.F.T.R. 6116; *Levy v. U. S.* (C.C.A.-3, 1921), 271 F. 942, 2 A.F.T.R. 1368, in which a taxpayer was convicted of filing a false amended tax return; *Emmich v. U. S.* (C.C.A.-6, 1924), 298 F. 5, 4 A.F.T.R. 3917; *Lerner Stores Corp. v. Commissioner* (C.C.A.-2, 1941), 118 F. (2d) 455, 26 A.F.T.R. 711. See also *Zellerbach Paper Co. v. Helvering* (1934), 293 U. S. 172.

If the taxpayer's mistake had been one of deducting less depreciation than the amount allowable, the Government would proceed to reduce the base by the larger amount allowable. If it is equitable for the Government to do this, why should it not be equitable, as the legislature intended, that the same right be extended to the taxpayer especially where the original excessive deduction was taken by mistake and the correction of the mistake will not result in any loss of tax for the years in which the mistake was made, or in the loss of any legally computable tax for any year. The amended returns in this case represent the formal reporting of facts and errors which the taxpayer had for years been reporting to the Internal Revenue Agents and to the Commissioner of Internal Revenue. The amended returns are in effect conceded to be correct so consideration of the returns would have resulted in the concession of the appellant's contentions and the correction of errors made in the original returns. The Commissioner of Internal Revenue avoided this by treating the amended returns as though they had never been filed. We respectfully submit that this action of the Commissioner is improper and that the exorbitant tax levied by him against the appellant by reason of such action should not be countenanced or sustained.



## V.

THE DISTRICT COURT ERRED IN REFUSING TO REOPEN THE CASE TO RECEIVE IN EVIDENCE THE LETTER RECEIVED BY APPELLANT FROM THE INTERNAL REVENUE AGENT IN CHARGE STATING THAT THE AMENDED RETURNS FOR THE YEARS 1932 AND 1933 HAD BEEN EXAMINED AND ACCEPTED AS CORRECT.

After the stipulations in this case were signed and filed with the District Court, an Internal Revenue Agent examined the amended returns filed for the years 1932 and 1933 and the appellant received a letter from the Internal Revenue Agent in Charge stating that the said returns had been examined and were found to be correct. Thereupon appellant filed a written motion with the District Court to reopen the case and receive the letter in evidence (R. 69). The Government opposed the motion on the ground that the matter was immaterial and in any event the examination and acceptance of the returns by the Internal Revenue Agent's office was all a mistake (R. 75). The Court denied the motion (R. 113).

Perhaps the letter was redundant because the stipulations in effect concede that the amended returns are correct and contain a correct statement of the depreciation deduction. But, if the Commissioner has any right to ignore the amended returns and his refusal to consider them should influence the ultimate outcome of this case to the detriment of the appellant, then the Court should have accepted the letter in evidence, to show that the amended returns were recognized and considered. True, the Commissioner asserts it was a mistake—but mistake or not he cannot deny the *fact* that the returns were examined and

accepted by his agents, and treat it as though it had never happened. Furthermore, his action in resisting this motion does not speak well for his position in this case. The stipulations establish that he recognizes that the appellant made a mistake in the original returns for the years 1932 to 1935, that the Government's interest with respect to the tax liability for those years would not be prejudiced by a correction of those returns, that the appellant has tried to be co-operative and to correct the mistakes and filed amended returns to formally correct those mistakes, and that the amended returns are correct, yet he has vigorously opposed every effort made by the appellant *and his own agents* to reach the right result. Why should he do this? Is he influenced solely by the fact that by maintaining that position he can exact a greater tax from the appellant in later years? There is nothing in the income tax law which prohibits him from accepting corrections or from examining the amended returns and accepting them. He knows that they are correct. Why does he persist in refusing to give them any consideration? His resistance to appellant's motion is an expression of fear that consideration of the returns would require concession of appellant's position. Why fear this? Appellant's position is equitable and just and should be conceded. The District Court found justification for the Commissioner's position by construing the *Virginian Hotel Corporation* case as requiring him to accept the original erroneous returns and to take the position that the acceptance of the returns is conclusive against the appellant as to the allowance of the excessive depre-

ciation taken thereon. It is respectfully submitted that this interpretation of that case is not a correct interpretation as hereinbefore argued. The Virginian Hotel Corporation decision says nothing about amended returns or the right or duty of the Commissioner to consider them; nor does it say anything which prohibits or forecloses the Commissioner from taking any steps to properly administer the income tax laws, to correct erroneous deductions, and to avoid the imposition against any taxpayer of any greater amount of tax than is legally due.

The Commissioner knew the amended returns were correct and should have accepted them and given effect to them even without further examination by his agents. But if his failure to consider them is any justification for his failure to give effect to them, then his position is destroyed by the consideration actually given them by his agents, and it is respectfully submitted that the District Court erred in failing to grant appellant's motion and to receive the acceptance letter in evidence, and to conclude therefrom that the amended returns should be considered effective as correcting the original erroneous returns; and since those returns were conceded to be correct the Commissioner had no legal authority to allow any other deduction for depreciation for the years 1932 to 1935 inclusive than the correct deductions reflected thereon.

### CONCLUSION.

In conclusion it is respectfully submitted:

1. The *Virginian Hotel Corporation* case is not applicable to this case because the cases are distinguishable on their facts; or, if applicable at all, the case is controlling only on the proposition that the fact that no tax benefit was obtained from a depreciation deduction is not decisive of the question of whether or not the deduction was "allowed".

2. The District Court decision is wrong principally because the Court misconstrued the Supreme Court decision in the *Virginian Hotel Corporation* case as requiring the holding that the erroneous depreciation taken by appellant on its original returns for the years 1932 to 1935 could not be changed or corrected either by the appellant or the Commissioner. The *Virginian Hotel Corporation* decision is specifically limited to a situation where the depreciation taken in the earlier years was not challenged or objected to by the Commissioner or his agents, whereas in this case the agents of the Commissioner challenged the depreciation and corrected it. The limited issue in the *Virginian Hotel Corporation* case is entirely different from the principal issue in this case which relates to whether the Commissioner allowed the depreciation deduction aside from the application of the tax benefit rule. There is nothing in the *Virginian Hotel Corporation* decision which indicates that a depreciation deduction taken by a taxpayer on a return must be considered conclusively allowed even



though challenged and found by the Commissioner to be erroneous.

3. It is unjust and inequitable for the Government to refuse to permit appellant the right to restore to the unexhausted basis of its property the excessive depreciation erroneously and mistakenly reported on the original returns for the years 1932 to 1935, and to exact substantial taxes as the result of such refusal.

4. It was the intent of Congress that the statute should be so construed and administered as to accomplish just and equitable results, and not to permit the Commissioner to elect at the expense of the taxpayer whether he should comply with the income tax statutes in determining net income and whether he should allow the deduction authorized and prescribed by those statutes or some other deductions not authorized by those statutes.

5. It was improper for the Commissioner of Internal Revenue to close his eyes to the mistakes on the taxpayer's tax returns for the years 1932 to 1935 and to deny to the taxpayer, by refusing to consider or act upon the amended returns filed by it, the right to correct those mistakes.

6. The depreciation deductions taken by the taxpayer on its original returns for the years 1932 to 1935 were so flagrantly wrong that they were not allowable under the income tax laws and could not be allowed by the Commissioner, especially when (1) the returns themselves indicated that the deductions exceeded the depreciation charged off on the books,

(2) the taxpayer admitted the deductions to be wrong, (3) the Internal Revenue Agents challenged the deductions and corrected them, and (4) no just tax would be lost by the correction of the deductions.

7. The Commissioner has authority to allow only such deductions as are reasonably allowable under the statute, and the only depreciation reasonably allowable under the income tax laws for the years 1932 to 1935, inclusive, is the depreciation reported by the taxpayer on the amended tax returns for those years and computed by the Internal Revenue Agents and engineers in their detailed schedules correcting the depreciation. Where the Commissioner became aware of the facts showing the depreciation to be erroneous he had no authority to allow it, and he was under legal obligation to allow only the amount allowable under the statute. His refusal to accept the revised depreciation schedule which he knew to be correct, and his insistence in allowing a deduction which he knew to be wrong, cannot constitute a legal allowance under applicable income tax laws.

8. The cost basis of the depreciable assets as of December 31, 1935, should be reduced only by the depreciation stipulated in this proceeding herein as the correct depreciation for the years 1932 to 1935, inclusive and reported on the amended returns for the years 1932 to 1935, inclusive.

If the Court should decide that the Government and the District Court are correct in refusing to restore to the base as of December 31, 1935, any of the

excessive depreciation taken on the original returns for the years 1932 to 1935, then the judgment below should be sustained. (Stip. 2, ¶ 27(b).) If the Court should decide that the base should be the amount claimed by the taxpayer or some other amount greater than that allowed by the Government, the amount of the tax recovery to which appellant is entitled can be computed by the parties after the decision is rendered.

The facts, the law, and the equities justify a decision in favor of the appellant and it is respectfully urged therefore that the Court reverse the decision of the District Court on the issues here involved.

Dated, San Francisco, California,

March 8, 1948.

Respectfully submitted,

GEORGE H. KOSTER,

*Counsel for Appellant.*

**(Appendix Follows.)**





## **Appendix.**



## Appendix

---

### DISCUSSION OF THE CASE OF THE VIRGINIAN HOTEL CORPORATION OF LYNCHBURG.

#### Introduction.

The District Court sustained the contention of the Commissioner of Internal Revenue that the identical question involved in this proceeding was decided by the United States Supreme Court in the case of *Virginian Hotel Corporation of Lynchburg v. Helvering*, decided June 7, 1943, with four Justices dissenting, 63 S. Ct. 1260, 319 U. S. 523, 30 A.F.T.R. 1304, and that his determination is in accord with that decision.

The Supreme Court did construe to a certain extent the statutory provisions here involved. It decided that in determining the unexhausted basis for depreciation, the cost must be reduced by the depreciation "allowed" in prior years even though no tax benefit was obtained from that allowance, a point not contested in this proceeding. That case went to the Supreme Court on an entirely different set of facts than is involved in this case with attention directed primarily on the question of whether depreciation is "allowed" if it did not result in a tax benefit in the year deducted, and to the fact that neither the Commissioner nor his agents had ever challenged or objected to the depreciation deducted in the prior years.

We concede that the *Virginian Hotel Corporation* case is conclusive on the point that a depreciation deduction may have been "allowed" even though no

tax benefit was derived therefrom but the matter of principal concern in this case is the question of the amount of depreciation, if any, actually or legally "allowed" for the years 1932 to 1935, apart from whether a tax benefit was obtained, and there was no such question in issue in the *Virginian Hotel Corporation* case.

**Conceded applicability of the *Virginian Hotel Corporation* case.**

In the instant case the appellant bank had large net losses for 1930 and 1931, far in excess of the depreciation deduction for those years so it obtained no tax benefit from those deductions. The depreciation for those years was based upon the conditions which the Bank in its judgment then believed existed as to the useful lives of the property. It is true that the Bank's survey of its property in 1932 proved that its judgment in the prior years was erroneous, based upon the subsequently discovered data, but that in no wise detracts from the fact that based upon what it knew in 1930 and 1931, its judgment in its depreciation claim for those years was correct. This is the type of situation to which we believe the *Virginian Hotel Corporation* case is applicable, to prevent the taxpayer from changing its depreciation *based upon after-discovered information* where the depreciation was properly allowed on the basis of conditions known to exist at the time the depreciation was claimed. It is because of our conviction that this is the proper interpretation of the *Virginian Hotel Corporation* case that we have *not* made claim for restoration of any depreciation deducted for the years 1930 and



1931. (See *Commissioner v. Mutual Fertilizer Co.* (C.C.A. 5, 1947, 159 F. (2d) 470); *Com. v. Cleveland Adolph Mayer Realty Corp.* (C.C.A. 6, 1947, 160 F. (2d) 1012). But the circumstances with respect to the depreciation for the years 1932 to 1935, as established by the stipulation, are entirely different than for the years 1930 and 1931.

In order to illustrate the basis of our conviction as to the applicability of the *Virginian Hotel Corporation* case, the history of the litigation in that case is important.

#### **History of litigation in the case.**

The case was first decided by the United States Board of Tax Appeals (now the Tax Court of the United States) in favor of the taxpayer on May 6, 1942. The decision was reported as a memorandum decision, Docket No. 105828. The Board stated the facts to be as follows:

The taxpayer had claimed depreciation at consistent rates from 1927 to 1938. The Commissioner of Internal Revenue did not question the depreciation deduction claimed in the years 1927 to 1937. The taxpayer had net losses in the years 1931 to 1936. The Commissioner, when auditing the 1938 return, determined that the depreciation rates were excessive and he applied revised rates on the unexhausted base of the property as of December 31, 1937, to compute the depreciation deduction for 1938.

The Board stated the issue to be whether the taxpayer is entitled to restore to its unexhausted base

of depreciable assets on December 31, 1937, the amount of \$31,400.25 due to a change in rates of depreciation by the Commissioner. The \$31,400.25 was the excess of the depreciation deducted on the returns from 1931 to 1936 over the lower depreciation which would have been computed for those years if the revised depreciation rates determined by the Commissioner for the year 1938 had been used. No tax benefit had been obtained by the taxpayer from the deduction of this excessive depreciation because the taxpayer had reported net losses for those years.

The Board decided in the taxpayer's favor solely on the ground that depreciation is not "allowed" within the meaning of the Revenue Acts unless it is actually taken as a deduction against taxable income and therefore, to the extent the taxpayer received no tax advantage in the loss years, the depreciation for those years should be computed by employing the lower rates determined by the Commissioner instead of the rates used by the taxpayer. The Board concluded that the excess of the depreciation deductions taken in the loss years, over the amounts allowable (using the Commissioner's revised rates) should be added to the base in computing the depreciation allowable for 1938.

In view of the fact that the decision of the Board was in favor of the taxpayer on a broad legal ground, there was no indication in the decision whether at the time the taxpayer took the deductions in the loss years, the deductions were not proper in accordance with the then known facts. It is clear in the findings

that the Commissioner did not question the deduction claimed in each year from 1927 to 1937 and this, we think, to be significant because in many of these years the taxpayer had taxable income and received a benefit from the deduction.

The Government appealed and the Board was reversed by the U. S. Circuit Court of Appeals for the Fourth Circuit in a decision rendered January 2, 1943; *Helvering v. Virginian Hotel Corporation of Lynchburg*, 132 F. (2d) 909, 30 A.F.T.R. 700:

The Circuit Court stated the question as follows:

“The question involved relates to the right of a taxpayer to add to the depreciation base, on a change of the rate of depreciation, amounts charged off and allowed as depreciation in prior years, where no tax benefit has been received as a result of such allowance. The contention of the taxpayer is that the new rate of depreciation should be applied retroactively, and that the excess depreciation charged off and deducted under the old rate should be restored to the base, when it appears that the taxpayer has received no tax benefit from the deduction. The Board sustained this contention and the Commissioner has asked that its decision be reviewed, contending that there is no authority for restoring to the base the depreciation which has been claimed and allowed, and that whether tax benefit has resulted from the allowance or not does not affect the matter.”

The Court thought the Board to be in error, stating:

“There is nothing in the statute, or elsewhere, which justifies restoring to the base the deprecia-

tion which has been claimed and allowed in prior returns, *merely because* such allowance has resulted in no tax benefit.” (Italics ours.)

It would appear from these quotations that the Court was considering the case solely from the point of view of whether a tax benefit or lack of it should have any bearing on the question of whether a deduction had been allowed, and that the Court was not inquiring otherwise into the propriety of the allowance.

The Court quoted with approval the dissenting opinion of Board Member Disney in the *Kennedy Laundry Company* case, 46 B.T.A. 70, relating to the Congressional intent in providing in the Revenue Act of 1932 that basis for depreciation shall be the basis adjusted for depreciation “to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws”. Part of the Court’s quotation from Member Disney’s opinion was:

“It seems to me that Congress in 1932, as it did in 1924, used the word ‘allowed’ in order ‘to remove a possible ambiguity’, that is, intended in order to make the matter definite, to say that if a depreciation item was ‘allowed’ in the sense that a claim therefor was not opposed or the depreciation was given effect in determining the tax situation for the year involved, it was to constitute a ground for adjustment of base for the property considered. I think that was all that Congress had in mind and that the legislators did not go into more tenuous consideration of tax advantage, or lack thereof in the year of



depreciation, but laid down a definite and not unfair rule. The taxpayer had the opportunity of preventing the 'allowance' of more depreciation than necessary (above the 'amount allowable' or reasonable amount). *He could limit his claim, withdraw it to any extent desired, or oppose its use by the Commissioner. This being within his power, there is no injustice in requiring him, when property basis is considered in later years, to abide by the figure used by him, or permitted by him to be used.*" (Italics ours.)

The Court, after giving this quotation, continues with this statement:

"There was no intention to authorize retroactive adjustments. With respect to this, the report of the Senate Committee referred to above had the following to say: 'Your committee has not thought it necessary to include any express provision against retroactive adjustments of depreciation on the part of the Treasury as the regulations of the Treasury seem adequate *to protect the interests of the taxpayers in such cases. These regulations require the depreciation allowances to be made from year to year in accordance with the then known facts and do not permit a retroactive change in these allowances by reason of the facts developed or ascertained after the years for which such allowances are made.*'" (All italics ours.)

The Court then concluded that the Commissioner's method of computing the depreciation for the year 1938 was proper, and that the basis for depreciation should not be increased by any part of the depreciation deducted in the loss years.

The Court seemed to base its opinion principally on the ground that the fact that the taxpayer had not obtained a tax benefit from the deduction was irrelevant to the issue as to whether the basis had to be adjusted for the depreciation "allowed". The Court does not mention any question as to whether the depreciation for the earlier years had been "allowed" or properly "allowed", but it would appear from the Court's quotation of the Senate Committee report that the depreciation allowance is to be made from year to year in accordance with the then known facts, and from the Headnote 2 in the official report of the case, reading as follows: "Where hotel established depreciation schedule *based upon an estimated useful life* of property and *subsequently estimated* useful life was fixed at a longer period, hotel was not allowed to add to new depreciation base excess amounts previously charged off and allowed as depreciation notwithstanding that no tax benefits had been received as a result of such allowances", and from the fact that the Court made no conclusion either way as to whether the amount actually allowed exceeded the amount allowable under the facts known at the time, that the Court purposely avoided a conclusion that the amount allowed was in excess of the amount allowable for the respective years. We believe it significant too that the Court quoted that portion of Member Disney's opinion to the effect that the taxpayer had the opportunity to "limit his claim, withdraw it to any extent desired, or oppose its use by the Commissioner" because there is nothing in the case which indicated that there had ever been any reason prior to

the time the Commissioner audited the 1938 return to question the depreciation taken by the taxpayer in years prior to the year 1938.

The taxpayer appealed the case to the United States Supreme Court who granted certiorari because of a conflict between this case and the *Pittsburg Brewing Company v. Commissioner* case, 107 F. (2d) 155, decided by the Circuit Court of Appeals for the Third Circuit, in which case the Court decided that depreciation claimed in excess of the amount legally allowable is not "allowed" unless taxable income is offset thereby, and here again there was no other question as to the propriety of or the actuality of the allowance. The decision of the Supreme Court in the *Virginian Hotel Corporation* case, rendered June 7, 1943, is reported in 63 S. Ct. 1260, 319 U.S. 523, 30 A.F.T.R. 1304.

The Supreme Court decided the case squarely on the issue of whether the basis would have to be reduced by the excess of depreciation deducted and allowed over the amount properly deductible where the excess deduction did not serve to reduce taxable income in the years the deductions were taken, and held that the base must be reduced by the depreciation allowed regardless of whether the allowed deduction resulted in a tax benefit.

The Court did say that the use of the word "allowed" in the statute involved in the case, "plainly has the effect of requiring a reduction of the depreciation basis by an amount which is in excess of depreciation properly deductible". The Court also stated

that deductions not challenged by the Commissioner of Internal Revenue are "allowed". In its statement of the facts the Court pointed out that "No objection was taken by the Commissioner or his agents to the amounts claimed and deducted". With respect to the interpretation of the statute, the Court stated:

"The requirement that the basis should be adjusted for depreciation 'to the extent allowed (but not less than the amount allowable)' first appeared in the Revenue Act of 1932. Prior to that time the adjustment required was for the amount of depreciation 'allowable'. The purpose of the amendment in 1932 was to make sure that taxpayers who had made excessive deductions in one year could not reduce the depreciation basis by the lesser amount of depreciation which was 'allowable'. If they could, then the government might be barred from collecting additional taxes which would have been payable had the lower rate been used originally.\* But we find no suggestion that 'allowed' as distinguished from 'allowable' depreciation is confined to those deductions which

---

\*S. Rep. No. 665, 72d Cong., 1st Sess., p. 29: "The Treasury has frequently encountered cases where a taxpayer, who has taken and has been allowed depreciation deductions at a certain rate consistently over a period of years, later finds it to his advantage to claim that the allowances so made to him were excessive and that the amounts which were in fact 'allowable' were much less. By this time the Government may be barred from collecting the additional taxes which would be due for the prior years upon the strength of the taxpayer's present contentions. The Treasury is obliged to rely very largely upon the good faith and judgment of the taxpayer in the determination of the allowances for depreciation, since these are primarily matters of judgment and are governed by facts particularly within the knowledge of the taxpayer, and the Treasury should not be penalized for having approved the taxpayer's deductions. While the committee does not regard the existing law as countenancing any such inequitable results, it believes the new bill should specifically preclude any such possibility."



result in tax benefits. 'Allowed' connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail numerous deductions. If the deductions are not challenged, they certainly are 'allowed' since tax liability is then determined on the basis of the returns. Apart from contested cases, that is indeed the only way in which deductions are 'allowed'. And when all deductions are treated alike by the taxpayer and by the Commissioner, it is difficult to see why some items may be said to be 'allowed' and others not 'allowed'. It would take clear and compelling indications for us to conclude that 'allowed' as used in Section 113 (b) (1) (B) means something different than it does in the general setting of the revenue acts."

Four Justices dissented from the majority opinion.

**Distinguishing features between *Virginian Hotel Corporation* case and this case.**

It is clear that *at no time* did the Commissioner of Internal Revenue *or his agents* challenge the depreciation taken by the Virginian Hotel Corporation for years prior to 1938. In that respect this case is distinguishable from the instant case since the record shows quite clearly that the Commissioner's agents not only challenged the Bank's depreciation for the years 1932 to 1935, but also corrected it. It is also clear, so it seems to us, that there was no question that the deductions taken by the Virginian Hotel Corporation for years prior to 1938 were correct, based upon conditions known at the time the depreciation

was deducted and it was only the subsequently made estimate which indicated that the rates taken by the taxpayer were excessive. In that respect the case is distinguishable from the instant case since the record shows that the depreciation taken on the original returns was definitely wrong on the basis of conditions then known to the Bank and then reflected on its books.

It is also clear that the attention of the Courts in the *Virginian Hotel Corporation* case was directed exclusively to the question of whether a tax benefit from a depreciation deduction, or lack of it, should alone determine the question of whether the deduction was "allowed" under the statute. The Supreme Court, in answering that question, assumed that the depreciation "allowed" in the prior years exceeded the amount "allowable" but actually the factual basis presented the question not specifically discussed, because of the limited issue present in the case, of whether a revised depreciation based upon subsequently made estimates could be claimed by the taxpayer to be "allowable" depreciation, as against the amount actually deducted based upon the conditions known at the time the deduction was taken, and we cannot be certain whether the Supreme Court was nevertheless influenced by this circumstance.

While the contention as to the effect of a lack of tax benefit from the deduction was the only contention considered in the *Virginian Hotel Corporation* case, that contention is merely an incidental one in this case. The principal issue in this case is whether under the many other facts (the like of which were not

present in the *Virginian Hotel* case) the depreciation deductions taken in the original returns for 1932 to 1935 were allowed at all, or if allowed, whether they were properly allowed.

It is clear that the Supreme Court merely assumed that when a deduction is taken on a return and not challenged, it is allowed. It is significant and important to note that the Court made this assumption upon the qualifying condition that the depreciation had not been challenged by the Commissioner or his agents, because the existence of that condition makes it unnecessary to question whether the Court would have made the same assumption if it had had before it some evidence of the procedure actually followed in handling tax returns. The Court was not called upon to decide what constitutes an allowance where the deduction is challenged, and was not in a position to decide that point because there was no evidence before the Court as to the machinery for allowances of deductions, or the office practices under which errors might be discovered or deductions challenged and under which corrections might be merely deferred, or the errors tolerated because no tax would result from the corrections. Nor was there evidence that a deduction might be challenged long after the return was accepted and that actually the deductions for any taxable year are subject to challenge and disallowance, even after the return is accepted, so long as the statute of limitations has not barred the assessment of tax for that year *or for any later year* as to which additional tax might result from the disallowance. In the instant case the record is replete with

evidence that if there is any allowance at all of a deduction otherwise than in a contested or thoroughly investigated case, there is no certainty of allowance until by lapse of time and the bar of the Statute of Limitations there is absolutely no possibility of a tax liability for any year from the disallowance of the deduction (R. 30, Stip. ¶ 6a). The record shows that in a loss year a challenged deduction may be found to be erroneous by the Commissioner or his agents and yet may not be changed because of the Commissioner's rule that where no tax would result from the correction, no time should be spent by the agents to make the correction. Even if the Commissioner should make a change, there is no procedure which provides for informing the taxpayer of such change if no tax resulted therefrom (R. 30, ¶ 6). The Supreme Court might very well have had in mind the possibility of just such a situation as exists in this case and therefore specifically limited its decision to avoid its application to a case such as this one where the deduction was challenged.

There is nothing in the *Virginian Hotel* case to show that the taxpayer ever made any effort, other than in that particular litigation to correct the depreciation for the prior years. In that respect that case is distinguishable from the instant case since in this case the Bank tried for nine years to obtain the correction of errors which might be attributable to the negligence or mistake of its employees in failing to take the proper depreciation deductions in the years 1932 to 1935, actually did obtain a correction of the deductions by the government agents, and then filed amended returns correcting the deductions after



the Commissioner of Internal Revenue rejected the work of his agents.

It is respectfully submitted that although there is a similarity of the ultimate issues in the *Virginian Hotel* case and this case, the cases are so different factually that the *Virginian Hotel* case cannot be considered applicable as determinative of this case. The principle pronounced in that case, that a depreciation deduction may be "allowed" even though no tax benefit was derived therefrom is applicable but since that point is here conceded and is not relied upon to establish appellant's contentions which relate to whether the excessive deduction was or could be allowed, that case is of no further applicability.

This case involves essentially the effect to be given to a particular set of facts. One instance alone, the fact that in this case the government agents challenged the depreciation deductions taken in 1932 to 1935 and corrected them whereas in the *Virginian Hotel* case there was no challenge of the deductions, would justify either a conclusion contrary to the *Virginian Hotel* decision, or a conclusion that the *Virginian Hotel* case was distinguishable on the facts and therefore inapplicable.

The *Virginian Hotel* case contains no answer to whether under the facts in this case the Commissioner of Internal Revenue had any right to "allow" the depreciation deducted by the Bank on its original returns for the years 1932 to 1935, or whether he did allow it, or whether he had any right to refuse and reject the Bank's efforts to correct those original returns and the depreciation claimed thereon.



No. 11,718

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION (a national  
banking association),

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the District Court of the United States for the  
Northern District of California.

**BRIEF FOR APPELLEE.**

---

THERON LAMAR CAUDLE,

Assistant Attorney General.

SEWALL KEY,

GEORGE A. STINSON,

FRED E. YOUNGMAN,

Special Assistants to the Attorney General.

FRANK J. HENNESSY,

United States Attorney,

WILLIAM E. LICKING,

Assistant United States Attorney.





## Subject Index

---

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	3
Statutes and regulations involved .....	4
Statement .....	4
Summary of argument .....	14
Argument:	
The District Court did not err in holding that the taxpayer is not entitled to increase its depreciation base for the years here involved by amounts deducted as depreciation in prior years in excess of depreciation properly allowable for those years.....	16
Conclusion .....	26
Appendix .....	i

## Table of Authorities Cited

---

### Cases

Pages

Virginian Hotel Corp. v. Helvering, 319 U. S. 523, rehearing denied, 320 U. S. 810 .....	17, 18, 19, 20, 21, 22, 23, 24
--	--------------------------------

### Statutes

#### Internal Revenue Code:

Sec. 23 (26 U.S.C. 1940 ed., Sec. 23) .....	16, App. i
Sec. 113 (26 U.S.C. 1940 ed., Sec. 113) .....	
.....	16, 17, 23, 24, 25, App. ii
Sec. 114 (26 U.S.C. 1940 ed., Sec. 114) .....	16, App. ii

#### Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 23 .....	3, App. i
Sec. 113 .....	3, 18, App. i
Sec. 114 .....	3, App. i

### Miscellaneous

I.T. 2944, XIV-2 Cum. Bull. 126 (1935) .....	23
--	----

#### S. Rep. No. 665, 72d Cong., 1st Sess., p. 29 (1939-1 Cum.

Bull. (Part 2) 496, 517) .....	25
--------------------------------	----

#### Treasury Regulations 101:

Art. 23(1)-4 .....	17, App. ii
Art. 23(1)-5 .....	17, App. ii
Art. 23(1)-9 .....	17, App. ii
Art. 113(b)-1 .....	17, App. ii
Art. 114-1 .....	17, App. ii

#### Treasury Regulations 103:

Art. 19.23(1)-4 .....	17, App. ii
Art. 19.23(1)-5 .....	17, App. iii
Art. 19.23(1)-9 .....	17, App. iv
Art. 19.113(b)(1)-1 .....	17, App. iv
Art. 19.114-1 .....	17, App. v

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION (a national  
banking association),

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal from the District Court of the United States for the  
Northern District of California.

## BRIEF FOR APPELLEE.

---

### OPINION BELOW.

The opinion of the District Court (R. 106-112) is  
reported at 69 F. Supp. 932.

---

### JURISDICTION.

This is a suit against the United States for refund  
of amounts paid by the Bank of America National  
Trust and Savings Association, herein sometimes re-  
ferred to as the taxpayer, as additional federal income  
taxes and interest for the taxable years 1938 and 1939.  
(R. 2-17.) The disputed deficiencies in taxes and in-

terest were 'paid on March 17, 1942, to Clifford C. Anglim, Collector of Internal Revenue for the First District of California, who was no longer in office when this suit was filed. (R. 38-39, 40, 41.) On March 14, 1942, the taxpayer filed a claim for refund of \$115,000 paid as income tax for the year 1938, and on April 25, 1942, it filed a further claim for refund of \$273,620.46 paid as income tax for that year. Also on April 25, 1942, it filed its claim for refund of \$97,477.46. These claims were rejected by the Commissioner of Internal Revenue on April 4, 1944. (R. 39.) This suit was filed November 25, 1944 (R. 140), within the time provided by Section 3772 of the Internal Revenue Code, for the recovery of \$54,382.97 paid as income taxes for the year 1938 and \$50,531.19 paid as income taxes for the year 1939. (R. 16.) The taxpayer's claims for refund for the years 1938 and 1939 were based upon the same grounds on which this suit is based, and the amounts sought to be recovered in this suit were included in the amounts covered by the refund claims for 1938 and 1939. (R. 39.) Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. It was agreed in the Court below, without prejudice to the parties with respect to the issues here involved, that the taxpayer was entitled to refunds of taxes and deficiency interest for the years involved in the aggregate sum of \$15,475.78. (R. 58-59, 115.) On December 5, 1946, the District Court filed an opinion in which it held that the taxpayer is not entitled to recover any amount in excess of that agreed to by the parties (R. 106-112), and on March 14, 1947, the District



Court entered its judgment in favor of the taxpayer in the sum of \$15,475.78, with interest thereon as provided by law, and its costs. (R. 130-131.) Within three months thereof, and on June 9, 1947, the taxpayer filed its notice of appeal pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

---

### QUESTION PRESENTED.

In its federal income tax returns for the taxable years 1932 to 1935, inclusive, the taxpayer deducted from gross income as depreciation upon its banking furniture and fixtures amounts in excess of the depreciation on such assets charged off on its books of account for those years. The amounts charged off as such depreciation on its tax returns exceeded reasonable allowances for depreciation for income tax purposes, but by reason of net losses sustained in those years such deductions did not result in any tax benefit to the taxpayer. The only question involved in this appeal is whether, under the stipulated facts, the basis for computing the taxpayer's allowance for depreciation on such assets under Sections 23 (1) and (n), 113 (b) (1) (B), and 114 of the Revenue Act of 1938 and the Internal Revenue Code for the taxable years 1938 and 1939 should be reduced by the excessive depreciation claimed in the taxpayer's returns for 1932 to 1935, inclusive, as held by the Commissioner and by the Court below, or only by the lesser amounts properly allowable under the statute for those years, as contended by the taxpayer.

**STATUTES AND REGULATIONS INVOLVED.**

The pertinent provisions of the statutes and Treasury Regulations involved are printed in the Appendix, *infra*.

---

**STATEMENT.**

The facts of this case are not in dispute. They are set forth in two stipulations of facts agreed to by the parties (R. 28-37, 38-68) together with the exhibits attached to the second stipulation of facts,<sup>1</sup> and are fully summarized in the findings made by the District Court. (R. 114-127.)

As stated above, this is a suit against the United States for refund of amounts paid as additional federal income tax for the years 1938 and 1939, and the only question involved on this appeal is the proper basis for determining a reasonable allowance for depreciation upon the taxpayer's banking furniture and fixtures for those years. The material facts necessary to a consideration of this issue can be stated briefly.

For each of the years 1932 and 1933, Transamerica Corporation filed a consolidated return of income in which it included the income and deductions of the taxpayer, an affiliated company. Those returns disclosed a large consolidated net loss for each year, including net losses of \$12,047,167.29 and \$10,827,436.79 for the taxpayer for 1932 and 1933, respectively. For

---

<sup>1</sup>A part of these exhibits are printed in the record. (R. 144-290.) The remainder were omitted by agreement of the parties. (R. 292-295.)

the years 1934 and 1935 the taxpayer filed separate corporation income tax returns in which it reported net losses in the respective years of \$13,689,532.14 and \$11,179,336.88. (R. 117-118.)<sup>2</sup> In arriving at these net losses for the respective years the taxpayer deducted the following amounts on its returns as depreciation (R. 117-118, 120):

<u>Year</u>	<u>Amount</u>
1932	\$1,947,819.34
1933	1,698,146.84
1934	1,620,826.23
1935	1,546,767.79

Included in the above deductions for depreciation claimed by the taxpayer on its returns for those years were the following amounts deducted as depreciation on the taxpayer's banking furniture and fixtures (R. 118):

<u>Year</u>	<u>Furniture</u>	<u>Fixtures</u>	<u>Total</u>
1932 .....	\$ 335,718.78	\$ 588,120.12	\$ 923,838.90
1933 .....	323,173.85	564,776.58	887,950.43
1934 .....	316,130.67	553,757.42	869,888.09
1935 .....	310,258.18	524,051.53	834,309.71
	<u>\$1,285,281.48</u>	<u>\$2,230,705.55</u>	<u>\$3,515,987.13</u>

The amounts charged off on the taxpayer's books as depreciation of furniture and fixtures for these same years were (R. 118):

<u>Year</u>	<u>Furniture</u>	<u>Fixtures</u>	<u>Total</u>
1932 .....	\$ 168,913.59	\$ 343,962.21	\$ 512,875.80
1933 .....	170,441.84	336,503.66	506,945.50
1934 .....	172,090.20	342,636.37	514,726.57
1935 .....	190,641.70	374,517.80	565,159.50
	<u>\$ 702,087.33</u>	<u>\$1,397,620.04</u>	<u>\$2,099,707.37</u>

<sup>2</sup>The net losses for 1934 and 1935 as found by the District Court seem to differ from the net losses reported on the 1934 and 1935 returns (R. 246, 254), but if the finding is in error it still has no bearing upon the question involved.

The deductions thus taken on the taxpayer's income tax returns for the years 1932 to 1935, inclusive, therefore, exceeded the amounts charged off on its books as depreciation of the same property for the respective years involved by \$410,963.10, \$381,004.93, \$355,161.52, and \$269,150.21, or a total of \$1,416,279.76. (R. 118-119.)

Prior to 1931 the taxpayer deducted from gross income shown on its tax returns the same amounts for depreciation on its furniture and fixtures as it charged off on its books; that is, eight per cent per annum of the original cost and on an estimated useful life of  $12\frac{1}{2}$  years. In 1932 the taxpayer estimated the useful life of its furniture and fixtures on hand December 31, 1931, was  $12\frac{1}{2}$  years from that date and of new furniture 15 years from date of purchase. Thereupon it changed its depreciation rate for bookkeeping purposes by using a rate of eight per cent of the residual value (meaning cost less accumulated depreciation) of the furniture and fixtures on hand December 31, 1931, and six and two-thirds per cent on new acquisitions thereafter. However, the taxpayer continued to compute its depreciation at the rate of eight per cent per annum on original cost in computing its depreciation on its tax returns for each of the years 1932 to 1937, inclusive. For the years 1932 to 1937, inclusive, the taxpayer thus deducted from gross income on its tax returns a larger amount for depreciation on furniture and fixtures than it charged off on its books. However, for the years not involved (1938 and 1939) the taxpayer deducted the same amounts as it charged off. (R. 119.)



The taxpayer's returns for 1932, 1933 and 1934 were successively examined by local internal revenue agents. When each of those agents had proceeded far enough in his audit to develop the fact that no tax liability existed for the period under examination by him, he submitted to the Internal Revenue Agent in Charge a report to that effect with the recommendation that the return for the particular year be accepted as filed. The reports and returns for those three years, after review and approval of each successive report in the office of the Internal Revenue Agent in Charge, were transmitted to the Bureau of Internal Revenue at Washington, D. C., with the recommendation of the field office that the returns be accepted as filed. When those returns and reports covering the years 1932, 1933 and 1934 were successively received by the Bureau they were reviewed, accepted and sent to the closed files. (R. 120.)

During February, 1937, Internal Revenue Agent Mooney began his audit and investigation of taxpayer's 1935 income tax return and spent several days at the taxpayer's office on that assignment. During the course of his audit he ascertained that depreciation had been taken on buildings and equipment and on furniture and fixtures to the extent of \$487,999.41 in excess of that charged off on the books for the year 1935 and orally questioned the accuracy of the deduction in conversation with taxpayer's tax counsel. Taxpayer's tax counsel stated to Revenue Agent Mooney that the depreciation taken on the return was excessive and requested him to cooperate in the preparation of corrected depreciation schedules. After some

further check of other items in the return, Agent Mooney concluded that no matter what adjustments or corrections, including any possible correction of the depreciation deduction, might be made to the returned net loss, there would still be no taxable income or tax due for that year. He then orally advised the taxpayer's tax counsel his conclusion to that effect and also advised him that under the practice of the Internal Revenue Agent's office he could not compile or aid in the compilation of revised depreciation schedules for the purpose of adjusting the depreciation deduction where he was satisfied that the adjustments would not offset the net loss reported on the tax return. (R. 121.)

On July 9, 1937, Revenue Agent Mooney submitted a report to the Internal Revenue Agent in Charge at San Francisco recommending that the 1935 return of the taxpayer be accepted as filed. That report, after review and approval in the office of the Internal Revenue Agent in Charge, was forwarded with the 1935 return to the Bureau with the recommendation that the taxpayer's 1935 return be accepted as filed. When that 1935 return and report were received in the Bureau, the return was reviewed, accepted and sent to the closed files. (R. 121-122.)

The procedure followed by the Bureau of Internal Revenue and its field agents in connection with the examination, audit and review of the above-mentioned income tax returns for the years 1932 to 1935, inclusive, is in accordance with the established administrative practice of the Bureau in such cases. (R. 122.)

No other action than herein stated has ever been taken by the Commissioner of Internal Revenue with respect to the income tax returns of the taxpayer for the years 1932 to 1935, inclusive. (R. 122.)

The income tax return filed by the taxpayer for 1936 also showed a net loss and was handled in the same manner. After review by the Bureau it, too, was accepted and sent to the closed files. Subsequently, in June, 1939, the Bureau, in connection with the audit of the taxpayer's 1937 return, reaudited the taxpayer's 1936 return and determined deficiencies in income tax for both years which were due in part to the Commissioner's disallowance of excess depreciation taken on the taxpayer's furniture and fixtures.<sup>3</sup> The taxpayer appealed from that determination to the Tax Court and later, in a settlement of the various issues involved in the 1936-1937 case, the taxpayer abandoned its contentions with respect to this disallowance of excess depreciation with the express understanding that the settlement for those years was made without prejudice to either party as to any issue involved in the determination of the taxpayer's income tax liability for subsequent years. (R. 122-123.)

Under the applicable Treasury Regulations, rulings and administrative procedure in effect when the original income tax returns of the taxpayer were filed for

---

<sup>3</sup>For the year 1936 the taxpayer had deducted \$845,024.08 as depreciation, of which the Commissioner disallowed \$492,240.97; and for 1937 it had deducted \$884,399.58, of which the Commissioner disallowed \$489,595.25. (R. 123.)

the years 1932 to 1935, inclusive, and when those returns were examined and reviewed by the Bureau of Internal Revenue, taxpayers were not required to charge off upon their books the same amounts of depreciation as had been deducted from gross income in their income tax returns, provided they maintained appropriate auxiliary records and furnished to or submitted for inspection by representatives of the Bureau sufficient detailed data or schedules to enable the Bureau's representatives to check or verify the correctness of the deduction taken. (R. 123-124.)

The taxpayer filled out Reconciliation Schedule L on page three of its income tax returns for the years 1932 to 1935, showing that the depreciation deducted in its returns exceeded the depreciation charged off on its books for each of those years. (R. 124.)

Irrespective of the discrepancy between the depreciation upon furniture and fixtures as charged off upon the books and as taken in the taxpayer's income tax returns for the years 1932 to 1935, inclusive, official revision of the depreciation schedules was not considered by the Bureau of Internal Revenue until an audit was made of a return showing a tax liability. (R. 124.)

In December, 1939, when Engineer Revenue Agent Clack called upon representatives of the taxpayer to discuss a procedure for revision of the taxpayer's depreciation schedules in connection with the Bureau's then pending examination of its income tax returns for the years 1937, 1938 and 1939 and its



pending reexamination of taxpayer's income tax return for the year 1936, the statute of limitation had already run with respect to the years 1932 to 1935, inclusive. (R. 124.)

Subsequently the Revenue Agents made an audit for the years 1936 to 1939 and submitted reports covering those four years. Those reports were submitted by the field agents in 1941 or later and included, among other things, a revised schedule of depreciation of the furniture and fixtures for the years 1932 to 1935, inclusive, and a readjustment of the depreciable base as of December 31, 1935. The Revenue Agents "allowed" as the annual deductions for depreciation the amounts charged off on the books therefor and added to the unexhausted base as of December 31, 1935, the aggregate amount of excess depreciation deducted in the tax returns for each of the years 1932 to 1935, inclusive. This addition was disapproved by the Commissioner. (R. 124-125.)

In auditing the taxpayer's returns for 1936, 1937, 1938, and 1939 the Commissioner made certain determinations as to the useful life of the taxpayer's furniture and fixtures which are not material here. In applying such determinations in computing the taxpayer's allowance for depreciation for the years 1938 and 1939 the Commissioner used the unexhausted base of such furniture and fixtures as of December 31, 1935, as reflected on the tax return for 1935, rather than the unexhausted base as shown on that return increased by the excessive depreciation

deducted by the taxpayer in its returns for the years 1932 to 1935, inclusive, as was done by the examining agents. (R. 125-126.)

After the commencement of this action the parties agreed that the amounts charged off upon the taxpayer's books as depreciation of its furniture and fixtures in each of the years 1932 to 1935, inclusive, were a reasonable provision for such depreciation in those years. (R. 126.)

The Commissioner has consistently used the cost of taxpayer's furniture and fixtures as taken from the books of the taxpayer in computing its allowance of depreciation of that property. (R. 126.)

On April 21, 1945, Transamerica Corporation filed amended consolidated corporation income tax returns, including therein amended income tax returns of the taxpayer, for the years 1932 and 1933; and on the same data the taxpayer filed amended income tax returns for the years 1934 and 1935. Those amended returns showed that the taxpayer (for income tax purposes) sustained net losses in each of those four years. In each of those amended returns the taxpayer recomputed its deduction for depreciation of furniture and fixtures to conform to the depreciation of that property as charged off upon its books for those same years. (R. 126.)

Under the established administrative practice of the Bureau of Internal Revenue during the period now under review, when amended returns are filed by any taxpayer such returns are given consideration

and are acted upon only if filed within the statutory period of limitation applicable to the period covered by the amended return. (R. 126-127.)

Up to the time of the execution of the two stipulations of fact submitted and filed in this proceeding, the Bureau of Internal Revenue has never given any consideration to the amended returns filed by or in behalf of the taxpayer in April, 1945, for the years 1932 to 1935, inclusive. (R. 127.)

After the case was submitted to the Court below, counsel for the taxpayer filed a motion to set aside the order of submission and for leave to submit further evidence consisting of a form letter sent to Transamerica Corporation, dated July 31, 1946, over the signature of the Internal Revenue Agent in Charge at San Francisco stating that upon examination of its income tax returns for 1932 and 1933 the conclusion had been reached that they should be accepted as correct. (R. 69-74.) The Government filed an objection to this motion. (R. 75-105.) The motion was denied. (R. 113.)

On the basis of the foregoing facts the District Court sustained the Commissioner's allowance for depreciation of taxpayer's banking furniture and fixtures for the years 1938 and 1939 (R. 127-130) and the taxpayer appealed.

### SUMMARY OF ARGUMENT.

The internal revenue laws applicable to the years here involved provide that in computing net income for federal income tax purposes there shall be allowed as a deduction from gross income, among other things, a reasonable allowance for exhaustion, wear and tear of property used in business. A similar allowance was provided in earlier Revenue Acts. For the years here involved the statute provides that the basis on which the allowance for depreciation is to be computed shall be the cost of such property reduced by prior exhaustion, wear and tear "to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws."

In this case the taxpayer filed income tax returns for the years 1932 to 1935, inclusive, in which it reported a large net loss for each year. In computing the net loss for each year it claimed deductions for depreciation of its furniture and fixtures which were substantially in excess of the amount properly allowable as such depreciation for each year. Internal revenue agents made preliminary examinations of these returns and were advised of the excessive deductions for depreciation. When their examinations proceeded to the point where it was clear that even if the deductions for excessive depreciation were corrected there would still be a net loss and no resulting tax liability, they so reported to the Commissioner of Internal Revenue and returned the tax returns to the Bureau of Internal Revenue where they were checked and sent to the closed files. This procedure



continued until a later year where a tax liability was indicated on the basis of a correct allowance for depreciation when the Commissioner had the returns audited and the allowance for depreciation corrected.

For the years 1938 and 1939 here involved the Commissioner computed a correct allowance for depreciation of the taxpayer's furniture and fixtures and disallowed the excessive deductions. In determining the adjusted basis under the statute for computing a reasonable allowance for these years he treated the excessive depreciation deducted in the taxpayer's returns for 1932 to 1935, inclusive, as having been "allowed" within the meaning of the applicable statute and reduced the taxpayer's cost basis of such assets accordingly. The District Court found as a fact that such excessive depreciation had been "allowed" in such prior years and sustained the Commissioner's allowance for the years here involved. Its finding is amply supported by the evidence.

There is no merit to the taxpayer's argument that the excessive depreciation deducted by the taxpayer for the years 1932 to 1935, inclusive, was not and could not have been allowed legally, and that therefore only the proper or "allowable" depreciation for those years should be deducted from its cost basis of such assets in determining its adjusted basis upon which a reasonable allowance for depreciation of such assets should be computed for the years here involved.

## ARGUMENT.

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE TAXPAYER IS NOT ENTITLED TO INCREASE ITS DEPRECIATION BASE FOR THE YEARS HERE INVOLVED BY AMOUNTS DEDUCTED AS DEPRECIATION IN PRIOR YEARS IN EXCESS OF DEPRECIATION PROPERLY ALLOWABLE FOR THOSE YEARS.

Section 23 of the Internal Revenue Code and corresponding provisions of the earlier revenue acts provide that in computing net income for federal income tax purposes there shall be allowed as a deduction, among others, a "reasonable allowance for the exhaustion, wear and tear of property used in the trade or business". Section 23 (1) of the Code, Appendix, *infra*. As to the years here involved, Section 23 (n) of the Internal Revenue Code and of the Revenue Act of 1938 (Appendix, *infra*) provide that the "basis" for computing such allowance "shall be as provided in section 114." Section 114 (Appendix, *infra*) provides that the "basis" upon which exhaustion, wear and tear, and obsolescence are to be allowed with respect to any property "shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property". So far as material here subsection (a) of Section 113 of the Code (Appendix, *infra*) provides that the unadjusted "basis" for determining gain or loss shall be the cost of the property, and subsection (b) of Section 113 (Appendix, *infra*) provides that the "adjusted basis" shall be the unadjusted basis provided in subsection (a) adjusted in accordance with subsection (b). The adjustment required by Section 113 (b) to the cost

of the taxpayer's furniture and fixtures which gives rise to the present controversy is that required by Section 113 (b)(1)(B), which reads as follows:<sup>4</sup>

(1) *General rule.* Proper adjustment in respect of the property shall in all cases be made—

\* \* \* \* \*

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, *to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws.* (Italics supplied.)

The taxpayer's position is that the excessive depreciation on furniture and fixtures deducted on its income tax returns for the years 1932 to 1935, inclusive, was not "allowed" within the meaning of the above provision and that its cost basis less allowable depreciation should not be further reduced by the excessive amounts deducted in its returns for those years. We submit there is no merit to the contention in view of the decision of the Supreme Court in *Virginian Hotel Corp. v. Helvering*, 319 U. S. 523, rehearing denied, 320 U. S. 810. In that case the taxpayer had deducted depreciation on its income tax returns on certain of its assets on a straight line basis (a certain percentage of the original cost of the items based upon the estimated useful life thereof) for each of the years 1927 to 1937, inclusive. The Commissioner did not question the depreciation claimed through the

---

<sup>4</sup>See, also, Sections 19.23(1)-4, 19.23(1)-5, 19.23(1)-9, 19.113 (b)(1)-1, and 19.114-1 of Treasury Regulations 103 (Appendix, *infra*) and the corresponding provisions of Treasury Regulations 101 promulgated under the Revenue Act of 1938.

latter year. For 1938 the taxpayer claimed a similar deduction at the same rates, but the Commissioner, upon audit of that return, determined that the property had a longer estimated useful life than the taxpayer had used and that, therefore, lower depreciation rates should have been used. Accordingly, he determined a deficiency for 1938, and in doing so he subtracted from the cost of the assets the depreciation theretofore deducted on the taxpayer's returns. The remainder was taken as the statutory "adjusted basis" of the property for 1938 under Section 113 (b)(1)(B) of the Revenue Act of 1938 for computing the 1938 allowance, thus resulting in a lesser deduction for that year. That taxpayer had reported taxable net income for some of the taxable years, but there, as here, a net loss had been reported for each of the taxable years 1931 through 1936; and there, as here, correction of the depreciation allowable and disallowance of the excessive deduction claimed for each of those years would still have left the taxpayer without taxable income for each of such prior years. There, as here, the taxpayer contended that the amounts of depreciation deducted for the years 1931 to 1936, inclusive, in excess of the deductions properly allowable for those years should not be subtracted from the depreciation base for 1938, and that the excessive depreciation so claimed for the loss years had not been "allowed" within the meaning of Section 113(b)(1)(B) of the 1938 Act. In the *Virginian Hotel Corp.* case, *supra*, the Supreme Court sustained the Commissioner's interpretation of the statute and his adjustment of the



taxpayer's income. Its decision is a complete answer to the contentions in this case. In rejecting the argument that the excessive depreciation deducted in the taxpayer's loss years had not been "allowed" within the meaning of the statute, that Court said (pp. 526-528):

But we find no suggestion that "allowed," as distinguished from "allowable," depreciation is confined to those deductions which result in tax benefits. "Allowed" connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail numerous deductions. If the deductions are not challenged, they certainly are "allowed," since tax liability is then determined on the basis of the returns. Apart from contested cases, that is indeed the only way in which deductions are "allowed." And when all deductions are treated alike by the taxpayer and by the Commissioner, it is difficult to see why some items may be said to be "allowed" and others not "allowed." It would take clear and compelling indications for us to conclude that "allowed" as used in § 113 (b) (1) (B) means something different than it does in the general setting of the revenue acts.

In answering other contentions made by the taxpayer in the *Virginian Hotel Corp.* case, the Supreme Court concluded (p. 528):

Congress has provided for deductions of annual amounts of depreciation which, along with salvage value, will replace the original investment of the property at the time of its retire-

ment. *United States v. Ludey, supra*; *Detroit Edison Co. v. Commissioner, ante*, p. 98. The rule which has been fashioned by the court below deprives the taxpayer of no portion of that deduction. Under that rule, taxpayers often will not recover their investment tax-free. But Congress has made no such guarantee. Nor has Congress indicated that a taxpayer who has obtained no tax advantage from a depreciation deduction should be allowed to take it a second time. The policy which does not permit the second deduction in case of "allowable" depreciation (*Beckridge Corp. v. Commissioner*, 129 F. 2d 318) is equally cogent as respects depreciation which is "allowed."

At the outset the taxpayer concedes that the Commissioner's method of determining its depreciation allowance for the taxable years involved was proper; that the statute requires the cost basis for depreciation to be reduced by "not less than" the allowable depreciation for prior years regardless of whether tax benefit was derived therefrom; and that the cost basis for depreciation must be reduced by the depreciation allowed in prior years even though in excess of the amount allowable "if that deduction was actually and legally allowed" under the income tax laws applicable to that particular year, or "if a tax benefit had been derived therefrom". (Br. 30.) It also magnanimously "concedes", in view of the Supreme Court's decision in the *Virginian Hotel Corp.* case, *supra*, that the "mere fact" that it obtained no tax benefit from the excessive depreciation deductions in

prior years “does not *in itself* justify a conclusion that the erroneous depreciation could not have been ‘allowed’ ”. (Br. 30.) It insists, however, that the fact that it did not receive any tax benefit from the excessive depreciation deducted in prior years, “*coupled with*” the fact that “the Commissioner knew that the deduction was excessive and that he and his agents challenged it and his agents corrected it”, does justify the conclusion that “the excessive depreciation was not allowed and could not have been allowed legally”. (Br. 31.)

It is because of this “*coupled with*” position of the taxpayer that we have set out at length in the foregoing statement the District Court’s findings with respect to the action taken in connection with the taxpayer’s returns for prior years and the usual procedure followed by the Bureau of Internal Revenue in such matters. The taxpayer in this case has seized upon the word “challenged” in the above quotation from the Supreme Court’s decision in the *Virginian Hotel Corp.* case and first seeks (Br. 13, 36-40) to limit the decision in that case to cases where the excessive deduction for prior years “had never been challenged by the Commissioner or his agents” and that the decision in that case is inapplicable here “since the prior year depreciation involved in the instant case was challenged by the Commissioner and his agents”. (Br. 36.)

We do not believe it necessary to enter into a discussion of whether or to what extent the decision in

the *Virginian Hotel Corp.* case could or should be limited because we see no merit to the taxpayer's argument here. The District Court found as a fact, on the evidence before it, that the Commissioner had "allowed" the deductions taken by the taxpayer in its returns for 1932 to 1935, inclusive, and that his allowance for the years here involved was fair and reasonable. (R. 127.) This finding is amply supported by the evidence.

The taxpayer's idea that its excessive depreciation deductions were "challenged" in this case seems to be based upon the fact that its returns for the prior years were examined by internal revenue agents; that the examining agents were aware of the excessive depreciation deductions; and that they conducted their examinations to the point where it was obvious that no tax liability would result from a disallowance of the excessive depreciation. But the Commissioner did not "challenge" the deductions. With this information he accepted the returns for 1932 to 1935, inclusive, as made and sent them to the closed files. There was no obligation on his part, legally or morally, to do otherwise. Accordingly the deductions claimed on the returns for those years were "allowed".

The taxpayer's argument (Br. 58-72) that under the circumstances the excessive depreciation deductions were not allowed and could not have been allowed is without merit. This argument is largely an unwarranted indictment of the Commissioner for condoning the dereliction of the taxpayer in the prepara-



tion of its income tax returns for the earlier years and for not taking the initiative in correcting returns which the taxpayer itself knew to be erroneous. It is an attempt to justify or excuse its long dereliction by shifting the blame for its present predicament to the Commissioner. The duty was upon the taxpayer to file correct returns of its income. If it chose to file erroneous returns showing no tax due, and the Commissioner found upon a preliminary examination that there still would be no tax due if the errors were corrected, he was under no obligation to correct them. The taxpayer's argument (Br. 66-72) that upon the Commissioner's failure or refusal to correct its errors under such circumstances it should itself be allowed to correct its own errors has merit if the statute of limitations has not run. See I.T. 2944, XIV-2 Cum. Bull. 126 (1935). It says it should not be estopped to make such correction even if the statute has run if to do so does not result in a loss of revenue to the Government. (Br. 64-66.) But the Supreme Court held in the *Virginian Hotel Corp.* case that the statute here involved cannot be construed to permit such retroactive adjustment for the purpose of determining the basis for depreciation in a later year. The argument (Br. 40-50) that the legislative history of Section 113 (b)(1)(B) of the Internal Revenue Code requires that section to be interpreted so as to permit retroactive adjustment of prior year returns under the circumstances of this case was fully considered

and answered otherwise in the *Virginian Hotel Corp.* case.<sup>5</sup>

Whether, as taxpayer argues (Br. 30-72), the filing of amended returns is a recognized practice for correcting errors is true or not is not important here. The income tax laws have never provided for the filing of amended returns. The taxpayer's basis for depreciation for the years here involved is fixed by law and the filing of amended returns for earlier years long after the statute of limitations had run for those years can have no bearing upon whether the excessive depreciation deducted in the original returns was "allowed" within the meaning of Section 113 (b)(1)(B) of the Revenue Act of 1938 and the Internal Revenue Code.

This also answers the taxpayer's argument (Br. 73-75) that the District Court erred in denying its motion to vacate the order of submission and receive in evidence the letter it received from the Internal

---

<sup>5</sup>While they were not made a part of the record on review, the court below was furnished with copies of the briefs filed by the parties in the *Virginian Hotel Corp.* case, and also with a copy of the petition for rehearing which was denied by the Supreme Court. The petition dealt at length with Bureau procedure in handling income tax returns disclosing net losses and what counsel called the unfairness that would result from the Supreme Court's decision. Two specific examples of such alleged unfairness were set out in a footnote to the argument, one of them referring specifically to the Bank of America situation involved in this case, and a long letter from the tax counsel of the Bank of America to counsel for the Virginian Hotel Corporation commenting upon the Supreme Court's decision and its effect upon its own situation was attached to illustrate the point made about the unfairness of the decision. It must therefore be assumed that the Supreme Court had the present situation before it when it denied the petition for rehearing.

Revenue Agent in Charge. The contents of the report made to the Bureau of Internal Revenue in connection with the examination of the amended returns for 1932 and 1933 (R. 86-89) clearly show the letter in question was not material to the issue here involved.

Contrary to the taxpayer's argument (Br. 40-50), if the legislative history of Section 113 (b)(1)(B) of the Code is to be resorted to in interpreting the otherwise clear language of the statute, it clearly shows, as held by the Supreme Court, that Congress intended that depreciation bases should be adjusted by subtracting therefrom for depreciation in prior years the amounts "allowed" or "allowable" therefor in the prior years, whichever is the greater, as is provided in the applicable Treasury Regulations. See S. Rep. No. 665, 72d Cong., 1st Sess., p. 29 (1939-1 Cum. Bull. (Part 2) 496, 517).

Finally, the equities of the case stressed by the taxpayer (Br. 50-57) were also urged before the Supreme Court in the *Virginian Hotel Corp.* case but were disposed of by pointing out that Congress has elected to make the year the unit of taxation; that it has provided for annual deductions for depreciation; that under its interpretation of Section 113 (b)(1)(B) taxpayers may not thereby recover their investment tax-free but Congress has made no such guarantee; that Congress has indicated no intention to permit a second deduction where no tax benefit resulted from the first deduction; and that the policy

which does not permit a second deduction in the case of “allowable” depreciation is equally cogent in the case of “allowed” depletion.

---

### CONCLUSION.

The decision of the District Court is right. It is supported by the facts and the law and should be affirmed.

Dated, April 20, 1948.

Respectfully submitted,

**THERON LAMAR CAUDLE,**

Assistant Attorney General.

**SEWALL KEY,**

**GEORGE A. STINSON,**

**FRED E. YOUNGMAN,**

Special Assistants to the Attorney General.

**FRANK J. HENNESSY,**

United States Attorney,

**WILLIAM E. LICKING,**

Assistant United States Attorney.

**(Appendix Follows.)**



## **Appendix.**



## Appendix

---

### Internal Revenue Code<sup>6</sup>:

#### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(1) *Depreciation.* A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

\* \* \* \* \*

(n) *Basis for Depreciation and Depletion.* The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

\* \* \* \* \*

(26 U.S.C. 1940 ed., Sec. 23.)

#### SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.* The basis of property shall be the cost of such property; except that—

\* \* \* \* \*

(b) *Adjusted Basis.* The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the

---

<sup>6</sup>The provisions of Sections 23 (1), (n), 113 (a), (b) (1) (B), and 114 of the Revenue Act of 1938, c. 289, 52 Stat. 447, are all the same as the corresponding provisions of the Internal Revenue Code.

basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.* Proper adjustment in respect of the property shall in all cases be made—

\* \* \* \* \*

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws.

\* \* \* \* \*

(26 U.S.C. 1940 ed., Sec. 113.)

#### SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.* The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

\* \* \* \* \*

(26 U.S.C. 1940 ed., Sec. 114.)

Treasury Regulations 103, promulgated under the Internal Revenue Code<sup>7</sup>:

Sec. 19.23(1)-4. *Capital sum recoverable through depreciation allowances.* The capital sum to be re-

---

<sup>7</sup>The provisions of Articles 23(1)-4, 23(1)-5, 23(1)-9, 113(b)-1 and 114-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, are substantially the same as the corresponding provisions of Regulations 103.



placed by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. \* \* \*

Sec. 19.23(1)-5. *Method of computing depreciation allowance.* The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. \* \* \*

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. \* \* \*

Sec. 19.23(1)-9. *Records of depreciable property.* In order that the verification of depreciation allowances claimed by the taxpayer may be facilitated, depreciation shall be recorded on the taxpayer's books, the amount measuring a reasonable allowance for depreciation either being deducted directly from the book value of the assets or preferably being credited to a depreciation reserve account, which should be reflected in the annual balance sheet. \* \* \* Also, the taxpayer's books shall show the basis of the depreciable property and any adjustments thereto \* \* \*. If a taxpayer does not desire to have his regular books of account show all of the factors entering into the computation of depreciation allowances, such factors shall be recorded in permanent auxiliary records which shall be kept with and reconciled with the regular books of account.

Sec. 19.113(b)(1)-1. *Adjusted basis: General rule.*

The adjusted basis for determining the gain or loss from the sale or other disposition of property is the cost of such property \* \* \* adjusted to the extent provided in section 113(b).

\* \* \* \* \*

The cost or other basis must also be decreased by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion to the extent such deductions have in respect to any period since February 28, 1913, been allowed (but such decrease shall not be less than the amount of deductions allowable) under chapter 1 or prior income tax laws. The adjustment required for any tax-

able year or period is the amount allowed or the amount allowable for such year or period under the law applicable thereto, whichever is the greater amount. A taxpayer is not permitted to take advantage in a later year of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. The determination of the amount properly allowable shall, however, be made on the basis of facts reasonably known to exist at the end of such year or period. The aggregate sum of the greater of such annual amounts is the amount by which the cost or other basis of the property shall be adjusted.

\* \* \* \* \*

Sec. 19.114-1. *Basis for allowance of depreciation and depletion.* The basis upon which exhaustion, wear and tear, obsolescence, and depletion will be allowed in respect of any property is the same as is provided in section 113 (a), adjusted as provided in section 113 (b), for the purpose of determining the gain from the sale or other disposition of such property, except as provided in section 19.23(m)-3, relating to depletion based on discovery value, in section 19.23(m)-4, relating to percentage depletion in the case of oil and gas wells, and in section 19.23(m)-5, relating to percentage depletion in the case of coal mines, metal mines, and sulphur mines or deposits.





No. 11,718

IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

---

BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION (a na-  
tional banking association),

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANT'S REPLY BRIEF.

---

GEORGE H. KOSTER,  
300 Montgomery Street, San Francisco, California,  
*Counsel for Appellant.*

FILED

MAY 5 1903

PAUL P. O'BRIEN



## Table of Authorities Cited

### Cases

	Page
Horuff v. U. S., 80 ct. cl. 761, 9 F. Supp. 1016, 15 AFTR 439 .....	2
Mabel Elevator Co., 2 BTA 517 .....	2
National Refining Co. of Ohio, 1 BTA 236.....	2
The Vitamin Co., 21 BTA 311 .....	2
U. S. v. Mabel Elevator Co., Dist. Ct. Minn. 17 F. (2d) 109, 6 AFTR 6495 .....	2

### Statutes

Revenue Act of 1932, Section 275 .....	2
Revenue Acts of 1934 and 1936, Section 275 .....	2

### Miscellaneous

Cum. Bul. Dec. 1923, IT 1714, p. 229, S.M. 1404 .....	2
Cum. Bul. June, 1924, p. 335 .....	2
Cum. Bul. XIII-1, Min. 1470, p. 59 .....	4
Cum. Bul. XV-2, p. 148 .....	4





IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION (a na-  
tional banking association),

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANT'S REPLY BRIEF.**

---

The briefs already filed by the parties comprehensively present their respective positions as to the issues involved. There is but one portion of appellee's brief that in the opinion of appellant warrants some further reply.

On pages 22 and 23 of its brief appellee argues (1) that the Commissioner of Internal Revenue was under no obligation, legally or normally, to make any corrections of the depreciation deductions taken by appellant on its tax returns for the years 1932 to 1935, even though he knew the deductions to be erroneous; and (2) that the taxpayer's efforts to correct those errors by filing amended returns after the Commis-

sioner had finally refused to correct the errors, did not deserve consideration because the returns were filed after the statute of limitations had run.

The statute of limitations referred to by appellee is the statutory period of limitations for making assessments of additional taxes. As to 1932 and 1933 the period expired two years after the filing of the return (Section 275, Revenue Act of 1932) and as to 1934 and 1935 the period expired three years after the filing of the return (Section 275, Revenue Acts of 1934 and 1936). Even if this statute of limitations has any bearing in this case, and we think it does not because there was never any tax liability due for the years 1932 to 1935, the Bureau of Internal Revenue has consistently maintained that the filing of amended returns extends the statute of limitations as to any tax disclosed by that return (IT 1714, Cum. Bul. Dec. 1923, p. 229, S.M. 1404, Cum. Bul. June, 1924, p. 335) and although there are some Tax Court decisions which appear to hold the contrary (*National Refining Co. of Ohio*, 1 BTA 236; *Mabel Elevator Co.*, 2 BTA 517, also involved in *U. S. v. Mabel Elevator Co.*, Dist. Ct. Minn. 17 F. (2d) 109, 6 AFTR 6495, *The Vitamin Co.*, 21 BTA 311), it was held in the case of *Horuff v. U. S.*, 80 ct. cl. 761, 9 F. Supp. 1016, 15 AFTR 439, in December, 1935, that when the taxpayer filed an amended return after the statute of limitations had expired, and paid the tax shown thereon to be due, he had waived the limitation and could not recover the amount paid. So if the filing of the amended return had the effect of extending the statu-

tory period of limitations, then the Commissioner should have corrected the erroneous depreciation deductions just as he admits he would have corrected them in any other case where he was specifically called upon to do so before the period of limitations had expired.

Although there is a statute of limitations against making assessment of additional taxes, there is no statutory period of limitations against the review of a tax return and the correction of errors contained therein when the tax liability is not affected thereby. The appellant believed and had good reason to believe that the erroneous deductions in the returns for 1932 to 1935 would be corrected. It was not until 1945 that the negotiations between the appellant and the Commissioner about the corrections which were once made by the agents of the Commissioner and were rejected by the Commissioner, were concluded and the amended returns for 1932 to 1935 were filed immediately thereafter. The Commissioner refused to consider the amended returns on the ground that they were filed after the statute of limitations had expired. Since no assessment of additional taxes was involved, and since there is no limitation period against the correction of a return where no additional tax is involved, the Commissioner's excuse for his refusal to consider the amended returns is without justifiable foundation.

Aside from the filing of the amended returns however, the Commissioner's agents knew about the erroneous depreciation deductions when they audited

the returns before the regular statutory period of limitations on assessments for the years 1932 to 1935 had expired and as was argued in appellant's opening brief (pp. 58-72) the Commissioner's agents were then duty bound to disallow the erroneous deduction and to "advise the taxpayer with respect to the schedule and supporting information which must be prepared" (Mim. 1470 CB XIII-1, p. 59, CB XV-2, p. 148) to establish the correct deduction. Therefore, the Commissioner's office practice of deferring the computation of corrections of deductions *known to be erroneous* on returns showing large losses, until such time as those deductions entered into the computation of a tax liability for some later year, cannot be considered an allowance of the deduction, but rather *must* be considered a *disallowance* of the deduction and a deferment of the computation of the correct allowable deduction, since as argued in appellant's opening brief, pp. 58-64, the Commissioner has no authority to allow an illegal deduction, and *must* disallow the deduction upon discovery of its illegality. As also pointed out in appellant's opening brief, pp. 64-66, the only exception to this rule is where the taxpayer is estopped from invoking it, and there is no basis for estoppel in this case.

It is respectfully submitted that the Commissioner was legally bound to *disallow* the erroneous depreciation deductions taken by appellant on the original returns for 1932 to 1935, and therefore could not have allowed those deductions in law or in fact; and that he was morally and legally bound to determine the cor-

rect and "allowable" depreciation deductions for those years when determining the appellant's basis for depreciation for later years; and that he was not prohibited by any statute of limitations from determining the correct depreciation allowances for the years 1932 to 1935 or from considering the amended returns for those years which gave effect to the correction of the depreciation deductions. It is respectfully submitted that for the reasons set forth herein and in appellant's opening brief, the judgment of the District Court should be reversed.

Dated, San Francisco, California,

May 3, 1948.

Respectfully submitted,

GEORGE H. KOSTER,

*Counsel for Appellant.*





No. 11720

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

ARTHUR LEE FLYNN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLEE'S BRIEF.

---

JAMES M. CARTER,  
*United States Attorney,*

ERNEST A. TOLIN,  
*Chief Assistant U. S.  
Attorney,*

D. WENDELL REID,  
*Special Assistant U. S.  
Attorney,*

600 U. S. Postoffice and Court House Building,  
Los Angeles 12, California

*Attorneys for Appellee.*

FILED  
JUL - 3 1948



## TOPICAL INDEX

	PAGE
Jurisdiction .....	1
Symbols of reference.....	1
Statement of the case.....	2
Statement of the facts.....	3
Counts One and Two.....	3
Count Three .....	9
Count Four .....	12
Count Five .....	15
Count Six .....	18
Count Seven .....	19
Argument on points raised by the appellant.....	22
Comments on appellant's brief.....	35
Conclusion .....	46

## TABLE OF AUTHORITIES CITED.

CASES	PAGE
Flynn v. United States, 139 F. (2d) 669.....	16
Gordon v. United States, 254 Fed. 53.....	40
Hogue v. United States, 184 Fed. 245.....	39
McDonald v. United States, 264 Fed. 733.....	40
Paris v. United States, 260 Fed. 529.....	40
United States v. Philadelphia and Reading Railroad Company, 232 Fed. 953.....	39
United States v. Potter, 56 Fed. 83.....	39

### STATUTES

Federal Rules of Criminal Procedure, Rule 17(b) .....	23, 32
United States Code, Title 18, Sec. 558.....	39
United States Code Annotated, Title 18, Sec. 231.....	1
United States Code Annotated, Title 18, Sec. 546.....	1
United States Code Annotated, Title 28, Sec. 41(2).....	1

### TEXTBOOKS

2 Wharton's Criminal Law, Sec. 1552.....	39
--	----



No. 11720  
IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ARTHUR LEE FLYNN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

**Jurisdiction.**

The appellant was indicted under the perjury statute, 18 U. S. C. A. 231. The District Court had jurisdiction under 28 U. S. C. A. 41(2) and 18 U. S. C. A. 546. The offenses charged were committed in the Southern District of California in a criminal prosecution for impersonation,—United States vs. Arthur Lee Flynn, No. 19209 Crim.

**Symbols of Reference.**

The references hereinafter contained, preceded by "R" are to the record in this case which is the typewritten transcript of the said record on which this appeal was permitted to be considered by this court. Those references preceded by "AOB" are to the appellant's opening brief before this court. The appellant was convicted by a jury on August 5, 1947 before Honorable Dave W. Ling, Judge presiding, in the Southern District of California. Sentence was imposed on the defendant August 18, 1947.

### Statement of the Case.

The appellant was indicted on June 18, 1947, in the United States District Court for the Southern District of California, under 18 U. S. C. A. 231, for perjury in seven counts. All counts of the indictment alleged the specific acts of perjury which were committed in open court by the appellant in a case charging impersonation, which case was tried in the Southern District of California, on or about April 22 and 23, 1947, Criminal No. 19209, entitled United States vs. Arthur Lee Flynn. The case herein appealed is the case of United States of America vs. Arthur Lee Flynn, Criminal No. 19426.

The indictment charged the offense in each of the seven counts in substantially the language of the statute and clearly set forth the false statements alleged to have been made wilfully and contrary to his oath in certain material matters, the defendant then and there well knowing that his statements under oath were false and untrue.

On June 23, 1947, the appellant was arraigned and pleaded not guilty to all counts of the indictment and the case was set for trial July 29, 1947. The court appointed Robert H. Green, Esq., 215 West 7th Street, Los Angeles 14, California, to represent the defendant in this action, and the record will show that the defendant was adequately represented by competent counsel in the entire proceeding. The appellant filed an affidavit and petition pursuant to Rule 17 of the Rules of Criminal Procedure, for an order that a subpoena be issued for the Honorable Daniel M. Lyons, Pardon Attorney, United States Department of Justice, Washington, D. C., and for the Honorable Clyde O. Eastus, formerly United States Attorney, Dallas, Texas, which petition was denied by the Judge.

Upon conviction by the jury, motions for a new trial and in arrest of judgment were properly denied by the Judge on August 18th, and the defendant was committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of three years in an institution of the penitentiary type, to be selected by the Attorney General on each of the seven counts of the indictment, the said terms to begin and run concurrently and in addition thereto, to pay a fine of one cent unto the United States on each of the seven counts, concurrently, making a total fine of one cent, to stand committed until paid. The appellant having noted his appeal, and having filed his brief on appeal, relies on certain points, all of which will hereinafter be shown to have no merit, either based upon the record or otherwise. The appellant also has filed with this court a motion for leave to file and prosecute a further motion in the District Court to vacate the judgment in this case and both his appeal and this motion are to be considered together by order of this court.

### **Statement of the Facts.**

#### **COUNTS ONE AND TWO.**

The first count of the indictment charges appellant with the crime of perjury, in that on or about June 19, 1941, while appearing as a witness on his own behalf at the trial in the United States District Court at Los Angeles, appellant while under oath falsely testified that he had not been convicted of a felony on or about June 19, 1941; and, further, that after having examined an exemplified copy of a judgment of the District Court of the United States for the Northern District of Texas—which judgment recited that Arthur L. Flynn had been convicted of

the crime of impersonating a federal employee—appellant stated that he was not the Arthur L. Flynn named in such judgment; whereas, in truth and in fact appellant had been convicted of a felony on or about June 19, 1941, and he was the Arthur L. Flynn named in said judgment. Appellant was charged in Count Two of having committed the crime of perjury in that, in the course of the same trial referred to in Count One, appellant while testifying under oath stated that he had not been in Dallas, Texas, during 1941; whereas, in truth and in fact he had been in Dallas, Texas, during 1941, as he well knew.

The Government then offered the testimony of L. B. Figg, Deputy Clerk of the District Court, who testified that he was the courtroom clerk in Judge Weinberger's court on April 22, 1947, and that he marked certain exhibits received in evidence on that date, in Criminal case No. 19209. Government's exhibits in the instant case Nos. 2, 3, and 4 respectively [R. I, 25-27]. These exhibits were numbered 3, 7 and 8 in the former trial.

The Government then called Rufus H. Pevehouse, Deputy United States Marshal from Dallas, Texas, who testified [R. I, 29-39] that he knew the defendant; that in his official capacity as a Deputy United States Marshal in June of 1941, and specifically on June 19, 1941, he had custody of this defendant throughout the trial at which he was convicted in Dallas, Texas, and that upon the order of commitment of the defendant to the Federal Correctional Institution at Texarkana, Texas, he transported the said defendant on June 30, 1941 to that Institution, along with 24 other prisoners.

The Government then called as a witness Joseph L. Schmidt, Special Agent of the Federal Bureau of Investigation, who testified [R. I, 39 to R. I, 42] that he

investigated the case involving Arthur Lee Flynn; that he was present at the trial in Dallas, Texas, on June 19, 1941 and was there when sentence was pronounced; that he recognizes the appellant in this case as the same Arthur Lee Flynn who was convicted in Dallas, Texas, June 19, 1941.

The Government then called W. P. Jacquot, the Custodian Supervisor of the Federal Correctional Institution at Texarkana, Texas, in 1941, who testified that he recognized the appellant in this case as the same Arthur Lee Flynn who was committed to that Institution on June 30, 1941, and that said appellant served time there from June 30, 1941 until November 18, 1941. This witness produced the original commitment papers and they were offered in evidence as Government's Exhibit 5. This witness identified the fingerprints, or thumbprints, which were a part of the prison records, and testified that he made those prints from the thumb of Arthur Lee Flynn, the prisoner in the Dallas case above-referred to, and that the appellant in this case is the same Arthur Lee Flynn. He further testified that on November 18, 1941 he released Arthur Lee Flynn to J. P. Townsend, Deputy Sheriff of Dallas County, Texas, and identified a receipt signed by Mr. Townsend for the defendant's delivery to him.

The Government then called John W. Schilling, Deputy Sheriff of Los Angeles County, who identified several fingerprint records taken of the appellant, Arthur Lee Flynn, who testified that he compared a set of fingerprints taken of this appellant by himself on March 8, 1947 [Gov. Ex. 6] with fingerprints taken by other attachés of the Sheriff's office on the same date [Gov. Exs. 7 and



8], and with a set of fingerprints taken April 23, 1947 by other attachés of the same office [Gov. Ex. 9].

The Government then called witness Quinn Tamm, an inspector and fingerprint expert from the Federal Bureau of Investigation office in Washington, D. C., who qualified as an expert on the witness stand, and who produced 19 fingerprint cards kept under his direction in the Federal Bureau of Investigation at Washington, and who identified fingerprints of appellant taken beginning in 1940 [R. I, 59]; and Mr. Tamm testified further regarding these fingerprints that he had examined Government's Exhibit 6 together with the fingerprint records from the Washington office and that they all correspond and are identical fingerprints of the same individual [R. I, 61]. Sixteen of these nineteen cards were marked Government's Exhibits 12 to 27, inclusive, and the dates and places from which they came are set forth and verified by this witness [R. I, 63-64] as beginning November 18, 1940 to April 24, 1947, and they were received into evidence.

To refute the appellant's statement that he was in the army and was not in Dallas, Texas, on June 19, 1941 or at any time during 1941, the Government called as a witness Colonel Elmer C. Gault who testified [R. I, 66] that he was Chief of the Demobilized Personnel Records Branch of the United States Army at St. Louis, Missouri. He introduced into the record the Army record of Arthur Lee Flynn, Serial No. 18179191 [Gov. Exs. 28 and 29]. This exhibit shows that the appellant enlisted in the Army of the United States on October 11, 1942 and was discharged May 25, 1943. These exhibits [R. I, 71] were explained by Colonel Gault as showing the appellant's assignments as being always the rank or rate of private.

The testimony of this witness and the Army record, Government's Exhibits 28 and 29, conclusively establish the fact that this appellant was not in the Army of the United States during the year 1941 and was only in such service for the period October 11, 1942 to May 25, 1943, and was never in such service before or after these dates. The record clearly discloses that there was never any overseas service; that there was never any service with the paratroops; that he was never in the ferry command or the transport command as a soldier. Colonel Gault testified that a soldier is not necessarily required to receipt for a discharge; if, however, he is present and handed his discharge, sometimes a receipt for it is taken. Colonel Gault also testified [R. I, 86] that the enlistment record would show service in the National Guard if the appellant ever had such service, and according to the enlistment record by the appellant's own statement he never had any other service such as National Guard, etc. Colonel Gault testified that this is the complete service record of appellant and that due search of the Army records had been made and no other record of this appellant found.

The Government then called as a witness Reinhold A. Wahl, Assistant Custodian of Selective Service records in the State of Texas, who identified a selective service file on one Arthur Lee Flynn. Mr. Quinn Tamm, the Federal Bureau of Investigation fingerprint expert, was again recalled to the stand and testified [R. I, 93] that he had examined the fingerprint record in the Army Service file of Arthur Lee Flynn, Exhibit 29-A, with the other fingerprints previously referred to and introduced into the record, and that they were all of the same individual.

The Government then called as a witness C. E. Kindelberger who testified that he was a brother of the president

of the North American Aviation Company and that he was employed by that company in Dallas, Texas, in 1941, in fact, from 1940 until November, 1946; that he knew Arthur Lee Flynn, the appellant in this case, and that he first met the appellant in January, 1941 and saw him most every day thereafter for approximately three months.

The Government then called as a witness Walter Louis Smeton who testified [R. I, 99] that he was a supervisor at the North American Aviation plant from October, 1940 until September, 1945; that he knew the appellant and saw him at the plant for about three and one-half months in the early part of 1941. At this point in the trial the Government read from Exhibit I, transcript of the former trial in which the perjured testimony was given by the appellant [R. I, 102], wherein at the former trial the appellant had specifically testified that he did not go to Dallas, Texas, until 1942 and that he went to Dallas, Texas, for the first time on January 4 of 1942, attempting to show his recollection of the specific date by his having been discharged from the hospital on the eve of the new year of 1942 and then, in order to hedge on his statement that he had never been there prior to that date, he said that he crashed a plane on Love Field, Dallas, Texas, on Thanksgiving Day, 1940, but that he was never in Dallas between that date and January of 1942. It is obvious from this appellant's testimony that he has a phenomenal memory for dates and that he also has a phenomenal aptitude for fabricating stories to support the untruths which he utters.

The Government then called witness Hugh Hartson who is in charge of the Identification Records Bureau in the Sheriff's Department in Dallas, Texas, and is a captain in that Department. He testified that he knew the appellant

Arthur Lee Flynn; that the appellant was in the jail while he (Hartson) was employed in Dallas, Texas; and that Arthur Lee Flynn (the appellant) was fingerprinted there on April 10, 1941, and he presented the fingerprint record, Government's Exhibit 32 [R. I, 104]. He also produced other fingerprint records, Government's Exhibits 33, 34, 35, 36, and a picture, Government's Exhibit 37.

Undoubtedly, it cannot be disputed that the testimony of these witnesses conclusively shows that Arthur Lee Flynn was not in the Army during the year 1941 and that he was in Dallas, Texas on June 19, 1941, which he denied, and that he was convicted of a felony on June 19, 1941 in Dallas, Texas, all of which he denied under oath. It would seem at a glance that perhaps this count of the indictment was over-proved, but in a case of this type and with this type of defendant it is necessary and was proper that the accumulation of evidence presented was made available in order that there could be not the slightest doubt that this defendant had committed perjury with regard to his statements in connection with the conviction on June 19, 1941 in Dallas, Texas. This evidence also was corroborative and part of the proof on some of the other counts in the indictment.

### COUNT THREE.

In the third count of the indictment the defendant is charged with having falsely stated under oath in the impersonation case that he had not received any sum of money from Harry O. Wetzel at any time, and that he did not go into a bowling alley, known as the West Lake Bowling Academy, with Harry O. Wetzel and have a check cashed, and did not thereupon receive \$10 from the proceeds of the said check, and that he never at any time



went into a bowling alley with Harry O. Wetzel to have a check cashed, the appellant well knowing that he had gone into the bowling alley, known as the West Lake Bowling Academy, on or about December 2, 1946 with Harry O. Wetzel and then and there had a check cashed for \$10 and then and there received the said \$10 which constituted the proceeds of said check.

The Government called as a witness Harry O. Wetzel [R. I, 117]. Mr. Wetzel testified that he was a realtor; that he knew the defendant-appellant herein, and had known him since about November of 1946, and that on the 2nd day of December, 1946 the appellant came to his office and asked Wetzel to cash a \$10 check for him, and he sent the appellant across the street to the bowling alley to get the check cashed and that the appellant came back and said they wouldn't cash the check for him and then he, Wetzel, went over with the appellant, endorsed the check in the presence of the bartender, Johnny Barger, and the bartender gave the appellant \$10 for the check, Government's Exhibit 2. Wetzel identified the check and his signature thereon. Wetzel testified that this all took place in the West Lake Bowling Academy just across the street from his office in Los Angeles, Calif. An attempt was made in the cross-examination of this witness to show that the check was cashed in a bar and that the bar was not the same as the Bowling Academy. But the testimony in the case, including that of the defendant, will disclose that the bar was actually a part of the bowling alley and was generally referred to as the Bowling Academy, and there is no reason for splitting hairs when the defendant contended that his answer denying that he went into the bowling alley did not mean that he denied going into the bar. As part of same count he did, how-



ever, specifically deny receiving any money from Wetzel or from a check endorsed by Wetzel. Defendant's exhibit attached to his motion to vacate designated I was not in evidence at the trial and is not a true exhibit of the premises as alleged by him.

Then the Government called John H. Barger, a bartender employed at the West Lake Bowling Academy, who testified that on December 2, 1946 [R. II, 136] he was employed at the West Lake Bowling Academy, and that on December 2, 1946 he saw the appellant Arthur Lee Flynn and that Flynn came in with a check which he refused to cash and then later Flynn left, came back with Wetzel who endorsed the check, and that he, Barger, laid \$10 on the counter which Flynn picked up. He identified Wetzel's signature on the back of the check and the check as the one he cashed on that date.

Keith B. Krug was called as a witness for the Government [R. II, 141] and he presented the records of the Bank of America, Seventh and West Lake Branch [R. II, 187], and Krug testified that on December 3d a \$10 check was deposited by the West Lake Bowling Academy corresponding to the check, Government's Exhibit 2, cashed by the appellant in the presence of Wetzel and with Wetzel's endorsement by the witness Barger [see Redirect Examination of Barger, R. II, 141]. This completed the testimony on Count Three, which obviously proved beyond any doubt that the defendant-appellant herein cashed the \$10 check, and that he did receive the \$10; that the check was cashed at the West Lake Bowling Academy, and that the defendant definitely was there on December 2d and definitely did cash a check endorsed by H. O. Wetzel as he had categorically denied under oath in the impersonation trial in April, 1947 before Judge Weinberger.

COUNT FOUR.

In Count Four of the indictment the appellant was charged with having falsely testified under oath that in 1940 he had been ordered to duty with the Army Transport Command, also known as the Ferry Command in the Army Reserve, and that when released in the summer of 1941 from the Army of the United States he had the rate of Master Sergeant; that he went back into the Army in May of 1942 in the capacity of Master Sergeant and served with the Paratroopers until discharged on March 28, 1946; that he was in the South Pacific with the Paratroopers during 1944, 1945 and 1946, and that he was in the Army continuously from May, 1942 to March 28, 1946 with the exception of the period between March and August of 1943 during which period he was released by the Army to civilian authorities in San Francisco; that there was no other time during the said period that he was not in the Army; that with the Paratroopers he held the rate of Master Sergeant; and that he held a spot commission as First Lieutenant for ninety-six days in the Paratroopers during 1945.

The Government prosecutor read from the testimony of the impersonation trial [R. II, 144, 148] where in the former trial the appellant was cross-examined by Mr. Fitting, the Government prosecutor in that former trial, and the appellant stated, according to that record which had been established in this case as a correct record of the prior case (impersonation trial), that he was released in the middle of 1941 from the United States Army with the rate of Master Sergeant, and that he went back into the Army in April or May of 1942 as a Master Sergeant with the Paratroopers, and that he was with the Paratroopers from then until he was discharged, March 28, 1946; that

he served in the South Pacific; that he was there at various times, 1944, 1945 and 1946.

The Government then called as a witness Bernard Riley, Deputy Sheriff in San Francisco, who testified that he had been in that occupation since 1916; that he is at the time of this trial writ server [R. II, 149]; that he knew the defendant-appellant in this case, Arthur Lee Flynn, and that Flynn was in the jail in San Francisco from the first of February, 1943 until the 21st or 24th of June, 1944, but that he was not at all times in that same Jail No. 1, but that at certain times he was taken to Jail No. 2 at Snead Ranch in San Mateo County. According to this witness the appellant was back and forth from Jail No. 1 to Jail No. 2 from February, 1943 to June, 1944; that he personally remembered the defendant being there during these periods.

The Government then called as a witness Francis J. Smith, Captain of the Watch of the County Jail in San Francisco County, who testified that he knew the appellant and saw him at Jail No. 1 in San Francisco County; and he introduced the records showing Arthur Lee Flynn, whom he identified as the defendant in this case, as having been the same Arthur Lee Flynn who came to San Francisco County Jail February 1, 1943 and remained there either at Jail No. 1 or Jail No. 2 until the 21st of June, 1944; and that according to the records he, the defendant, was then transferred to McNeil Island Penitentiary in the custody of the United States Marshal.

The Government then called William Hanley who was Superintendent of Jails in 1943 at County Jail No. 2, above-referred to, who corroborated the testimony of the former witness, and introduced the record of Jail No. 2 concerning Arthur Lee Flynn, Government's Exhibit 40,

which corroborates further the period of time during 1943 and 1944 which this appellant was incarcerated at the San Francisco Jails No. 1 and No. 2 alternately.

The Government then called George Cammas, Jailer at Jail No. 2 in San Francisco, who introduced additional records in the form of cards, Government's Exhibits 41, 42, 43 and 44, including clothing records, etc. These records corroborate the testimony of the former witnesses that Flynn, the appellant herein, was incarcerated in the San Francisco jails from February, 1943 to June, 1944.

The Government then called as a witness John L. McCoy, Sheriff of Monterey County [R. II, 173]. This witness produced a booking card, Government's Exhibit 45, a fingerprint card, Government's Exhibit 46, an index card, Government's Exhibit 47. These documents showed that on January 29, 1943 the appellant, who was identified by the witness, was in this witness' custody on January 29, 1943 and was turned over to the United States Marshal January 31, 1943; that the appellant came into his custody from the Military Police of Fort Ord and that he delivered the defendant to Deputy United States Marshal Joseph Sweeney of San Francisco on January 31, 1943.

The Government then called as a witness John Merrill, Police Officer in the City and County of San Francisco, who produced fingerprints for Arthur Lee Flynn taken by him February 1, 1943 in San Francisco, Government's Exhibit 48. He also produced a photograph, Government's Exhibit 49 [R. II, 178, 180]. This witness testified that the appellant came to him from Deputy U. S. Marshal Joseph Sweeney. This witness produced a further record showing that on November 30, 1945 this same appellant was arrested in San Francisco, Government's Exhibit 50

[R. II, 181]; and that he was in City Prison from November 30th to December 10, 1945 on a check charge.

The Government then produced Thomas L. Brodmerkel, Police Officer of the San Francisco Police Department, who gave further testimony about the fingerprint record on Government's Exhibit 48 establishing appellant's presence in San Francisco during this period.

### COUNT FIVE.

In this count of the indictment the appellant is charged with having falsely testified under oath in the impersonation trial before Judge Weinberger that he had not been finally convicted of the felony of impersonating a major of the United States Army on or about March 18, 1943, and that he had so testified under oath knowing the same to be contrary to his oath and false. At this point the Government prosecutor read into the record from the impersonation trial in Judge Weinberger's court [R. II, 192] portions of the record:

"Q. Mr. Flynn, have you ever been convicted of a felony? A. Not finally, no sir."

Continuing on the appellant was asked if he was on March 18, 1943 convicted of the felony of impersonating a major of the United States Army; he first admitted that he was and then qualified his answers by saying, "No, not finally".

"Q. Was your conviction affirmed by the Circuit Court of Appeals? A. It was not affirmed by the Circuit Court of Appeals. The Circuit Court of



Appeals refused to take jurisdiction on a technicality of failure to apply within time in which to file the bill of exceptions within the time fixed by the rule and that the time had been fixed beyond the day of expiration and that the Circuit Court had no jurisdiction. I immediately sued out a writ of habeas corpus and I was discharged, or I was released.”

At this point counsel for the Government in the present case produced Government’s Exhibit 52, an exemplified copy of a record of conviction in the District Court of the United States, the judgment and commitment record, District Court of the United States, Northern District of California, Southern Division, and also produced an exemplified copy of the opinion and judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Arthur Lee Flynn, Appellant v. United States of America, Appellee*, Circuit Court No. 10498, Government’s Exhibit 53.

Exhibit 52 contains the mandate from the United States Circuit Court of Appeals for the Ninth Circuit, signed by the Honorable Harland Fiske Stone, Chief Justice of the United States, on the 29th day of May, 1944, and offered them into evidence. The Government prosecutor then cited *Flynn v. United States*, 139 F. (2d) 669, on which certiorari was denied by the Supreme Court of the United States on May 22, 1944 at 322 U. S. 748.

The Government then called Joseph J. Kennedy, Deputy United States Marshal, Northern District of California, who testified [R. II, 198] that he knew the appellant,

Arthur Lee Flynn; that the appellant was first in his custody on June 21, 1944 at which time he took the appellant in custody at the San Francisco County Jail and transported him with a carload of prisoners to McNeil Island Penitentiary.

The Government then called U. N. Durbin, Supervisor in Charge of Records at the United States Penitentiary at McNeil Island, Washington, who presented the record of Arthur Lee Flynn, Government's Exhibit 56, showing [R. II, 203] that the appellant was received at the Penitentiary on June 22, 1944 and remained there until September 17, 1945. He identified the appellant as the Arthur Lee Flynn to which that record pertains.

The Government then called John J. Hopkins, an Advisory Supervisor of Parole at the United States Penitentiary at McNeil Island, Washington, who identified the appellant as having been in the Penitentiary there from 1944 to sometime in 1945.

The Government then called Matthew T. Curran, United States Probation Officer of San Francisco, California, who testified that the appellant had been under his supervision in San Francisco from the time he left McNeil Island Penitentiary about September 20, 1945, until the 6th day of April, 1946. This witness introduced his record covering the appellant, Government's Exhibit 57 [R. II, 207] showing documents signed in his presence by Flynn, and showing that the appellant was conditionally released from the McNeil Island Penitentiary, and

that he signed certain papers in the presence of this witness, viz., a monthly report in connection with his conditional release, which report was dated January 21, 1946 and signed on that day in the presence of this witness. This establishes the fact that he was parolled from McNeil Island Penitentiary and required to report to Mr. Curran, the Parole Officer, thereafter, and establishes conclusively that he was attempting to mislead the court and testified falsely in Judge Weinberger's court in April of 1947, as is charged in Count Five of the indictment.

### COUNT SIX.

The appellant is charge in this count with having testified falsely in that he stated under oath that he was not in the United States Penitentiary at McNeil Island, Washington, in the latter part of 1944 and the early part of 1945. The evidence related under the preceding Count Five above clearly establishes that the defendant falsely testified, as charged in Count Six of the indictment, concerning his not being incarcerated at the McNeil Island Penitentiary in the latter part of 1944 and the early part of 1945. At this point the Government prosecutor read into the record the appellant's testimony in the former impersonation trial before Judge Weinberger:

“Q. Were you in the army in the latter part of 1944 and the early part of 1945? A. Yes, sir.

Q. Were you at McNeil Island? A. No, sir.

Q. Are you sure of that? A. I am sure that I wasn't there on those dates. It was during the pen-

dency of the writ of habeas corpus which was 1943 and Judge Levy issued the writ. I believe you have my discharge or Mr. Angel has it, your F.B.I. agent."

It is quite obvious from the above quotation as read into the record from the impersonation trial that the appellant was in that case attempting to avoid giving truthful testimony and led the jury to believe in that case that he had not actually been convicted of the offense of which he *had* been convicted, and to impress them with the idea that he was being persecuted and that he was a veteran of the World War, having served his Country overseas in the Paratroopers and thus gain favor and sympathy from the jury in the former trial, which was successful because the Government prosecutor in that case was not prepared to meet the denials with sufficient rebuttal evidence to show the perjury being there committed.

#### COUNT SEVEN.

In this count of the indictment the defendant is charged with having testified at the former impersonation trial in Judge Weinberger's court that he denied having shown in an application for employment with the Pacific Airmotive Corporation that he was discharged from the Paratroops with the rank of Major on April 28, 1946, and that Government's Exhibit 7, purporting to be the said application, when exhibited to him in the former impersonation trial referred to was not the one he had filled out and that he testified falsely in that matter under oath. At this point [R. II, 215] the appellant's testimony from the

former trial was read into the record, which discloses that he was shown the said application, Exhibit 7 in the former trial, now Exhibit 3 in the present case, which showed on its face that he had answered certain questions and among them he had stated that he was discharged April 28, 1946 from the Paratroops with the rank of Major; and the Government called as a witness Leonard G. Stearns, Director of Training for the Pacific Airmotive Corporation, Burbank, California. He stated that he had met the defendant-appellant in this case and he examined Exhibit 3, the application above-referred to, and that he had a conversation with the defendant-appellant concerning the said application; that he had asked the appellant to fill out the application; that the appellant filled out the application and brought it in to Mr. Stearns at which time Stearns looked it over and took it to his superior for further scrutiny. He stated that it was the only such application the company had on record from Arthur Lee Flynn. Thus it is conclusively established that when the appellant testified in the former trial that he had not personally filed the application and that he had filed another application by mail in which he had stated his rank as Sergeant Major, not Major, that he was attempting to evade and testify falsely, as charged in Count Seven of the indictment.

Mr. Charles Clifton Smith was called as a witness by the Government and he testified that during November, 1946 he was employed by the Pacific Airmotive Corporation at Burbank, California, as an Industrial Relations



Officer. He was shown Government's Exhibit 3, the application for employment previously referred to by the witness Stearns, and said that he had a conversation with the appellant concerning that application, and that Mr. Stearns was present during the conversation.

The Government then called additional witnesses, including George W. Kyl, who was qualified as a handwriting expert, and who was shown many of the documents introduced into the evidence of this case, including those on which the appellant admitted his signature and those on which he denied his signature, or other writings in the instant case, and after examining Exhibit 3, the application for employment to the Pacific Airmotive Corporation, Mr. Kyl testified that this application was written in the same handwriting as that of the appellant in the other documents [R. III, 255]. He testified that part of the writing was with a different pen than the other part of the writing and that a part of it appeared to have been written by a ballpoint pen and some of it by an ordinary type of pen, viz., that of the appellant in this case.

The Government then called Mr. Paul Fitting, the Assistant United States Attorney who prosecuted the impersonation case before Judge Weinberger and he identified the appellant as the defendant in that case; he testified that he had examined the transcript of the former trial about two weeks after the trial, and that it was identical with the questions which he put and which were answered by the defendant in that case (this appellant).

## Argument on Points Raised by the Appellant.

The points relied upon by the appellant on appeal will be considered in their order as listed by him.

### I.

That the indictment in this case is a fictitious, falacious, void order. Let it suffice to say that an examination of the indictment will reveal that it is drawn in substantially the language of the statute with regard to the charging part thereof and the facts concerning the allegations of false testimony are set forth in great detail. There is no reasoning by which the indictment could have been held insufficient or fatally defective. It contains the three elements usually considered by courts as the necessary elements of a valid indictment. First: that it is drawn in substantially the language of the statute alleged to have been violated. Second: that it adequately informs the defendant of the charges against him so that he can properly prepare his defense. Third: that the indictment is so worded that it could be set up as a bar to a future prosecution for the same offense or for an offense based on the same set of facts, thus placing him in double jeopardy against his constitutional rights. It is believed that this rule of construction need not be supported at this point by any citations of authority since this court is well aware of the universal application of the rule.

### II.

The appellant cites as a second point of error in his case that he was coerced in the going on trial in this case without there being available to him necessary and material evidence vital to his defense; that he was prevented from having evidence available by reason of fraud and deceit having been practiced upon him and false repre-

sentations made to him and his counsel by the prosecuting attorney.

This contention is so obviously without merit that it should receive little or no consideration by this court. The appellant refers apparently in this alleged error to the fact that he requested the court by motion to have subpoenaed a letter allegedly written by the former United States Attorney in Dallas, Texas (Clyde O. Eastus) to the Honorable Daniel M. Lyons, Pardon Attorney, Department of Justice, Washington, D. C., which letter is alleged by the defendant to have stated that the defendant's conviction in the District Court of Dallas, Texas, was based on perjured testimony, and he further refers to his motion for subpoenas to issue to the aforesaid former United States Attorney and Pardon Attorney for their attendance as witnesses at this trial. United States District Judge Mathes who heard the motion properly denied it as not having been presented in accordance with the Federal Rules of Criminal Procedure (Rule 17(b) Federal Rules of Criminal Procedure). There was no showing made by the appellant that the testimony of either of these persons as witnesses would have been material to his case. The alleged letter would have been merely a matter of opinion by Clyde O. Eastus, based upon statements made by the defendant to him concerning the evidence adduced at that trial and would have been hearsay of the rankest type. The record in this case discloses that the prosecutor, Mr. Homer Bell, Assistant United States Attorney in the Southern District of California, attempted, even without order of the court, to secure a copy of the alleged letter from the files of the United States Attorney in Northern District of Texas, who succeeded Mr. Eastus in that office, and his statement in

the record to that effect will be found in Volume III, page 269 of the Reporter's Official Transcript. The full text of the purported letter is set forth on pages 270-271 of the Transcript in which the then United States Attorney, Frank B. Potter, states that a diligent search of the files in that office had failed to disclose a copy of such a letter. There is no showing that the letter existed.

The appellant has stated in his opening brief that Mr. Bell, the prosecuting attorney, had agreed and promised to produce the said letter from Clyde O. Eastus to Daniel M. Lyons and the entire service record from the files of the Army of the United States and that he failed to do so to the prejudice of the defendant (AOB 13-14). As will be seen, efforts were made by the prosecutor, as above referred to, to obtain the alleged letter, and he was unable to do so. The service record of the defendant was produced as Exhibits 28 and 29 in this case and it showed that the defendant was at all times, while in the service, only a private, that he did not ever have a spot commission as a lieutenant; that he never was a major, that he was never even a sergeant or master sergeant, as claimed by him, and that his application for enlistment showed by his own statements that he had never had prior military service. Accordingly, even if the letter which allegedly was written by Clyde O. Eastus to the Pardon Attorney had been made available, it would have been of no material value to this defendant in the instant case.

### III.

Under the third allegation of error in his trial, the appellant cites substantially the same reasons why this case should be reversed by restating that he was pre-

vented from having the said witnesses on account of fraud and deceit practiced upon him and false and fraudulent representations made to him and his counsel concerning the production of witnesses and evidence in his behalf. The statement above in answer to his second point suffices as an answer to this point.

#### IV.

In this alleged error in his trial, the appellant states that he was deprived of having certain official documents, records and other written instruments, then and there the true and lawful property of himself because those documents, records and instruments were unlawfully seized and taken from him and thereafter withheld from him and that such action was abetted and condoned by the prosecuting attorney. The appellant here apparently refers to certain papers which he alleges were taken from him by the agents of the Federal Bureau of Investigation upon his arrest and incarceration. There is no showing in the record that any documents or papers were taken from the appellant's possession by the F.B.I. agents or any other law enforcement officers except his general testimony. His draft card however, which was introduced as evidence in the impersonation case before United States District Judge Weinberger, was voluntarily given to F.B.I. agents at an interview with him, and this allegation by the appellant is totally without merit, based upon the record in this case. This record does not disclose that demand was ever made for production of any such documents allegedly seized from him, either before or during the trial by either the appellant or his counsel. The only reference made to them is a general reference by the defendant in his opening brief and motion to vacate.



V.

This allegation is substantially the same as that in Point III and Point IV and the record discloses absolutely no indication by testimony or otherwise that any promises, agreements or guarantys were made to the appellant or his counsel or that any dissuasion was communicated to him which would in any manner dissuade him from seeking any legal procedures prior to the trial in order to insure the production of any witnesses or documents at the trial in his behalf. The appellant apparently refers here to the conferences between his counsel and the Assistant United States Attorney, Mr. Bell, and the record, as cited before, pages 269-279 of Volume III of the Reporter's Transcript, contains the explanation by the prosecutor, Mr. Bell, of the efforts which he made in an endeavor to secure a copy of the alleged letter and contains adequate explanation of all the negotiations between defendant's counsel and the prosecutor with regard to documents and other evidence mentioned at this point by the appellant.

VI.

The allegation of error contained in Point VI by the defendant is substantially the same as that contained in III, IV and V and the court's attention is directed to Defendant's Exhibits "B-1" and "B-2" submitted in connection with his motion to vacate which is being considered with this appeal. Exhibit "B-1" is a letter from Daniel M. Lyons, Pardon Attorney, Department of Justice, Washington, D. C., under July 7, 1947, to the Honorable Veto Marcintonio, Congressman from New York, enclosing a copy of a letter addressed to Arthur Lee Flynn, the appellant herein, at 306 North Broadway, Los Angeles 13, also dated July 7, 1947. This letter is

Exhibit "B-2" of the appellant herein not in evidence at the trial and lists certain photostatic copies of documents from the Pardon Attorney's files, stating that they are enclosed with that letter to the defendant, Arthur Lee Flynn. A reference to so-called Exhibit "B" will disclose that none of the communications would have been of any material value to the appellant in the trial of this case, since they were not material to the issues of the case in any of the counts contained in the indictment. Instead, these documents were merely communications between the Pardon Attorney and this appellant. There is no showing by the appellant that a pardon was ever issued to him or that he had ever had reason to believe that such would be issued except based upon the alleged statements of Clyde O. Eastus, concerning all of which it must be said, was merely an opinion and that this appellant's knowledge of legal procedures, as can be obviously ascertained from his actions and his testimony, would provide no basis for his alleged *bona fide* belief that he had not been convicted of a felony in Dallas, Texas, on June 19, 1941. It is clearly shown by the record, as before stated in this brief, that he served time in the Federal Correctional Institution at Texarkana, Texas, on a commitment under sentence at the conclusion of that trial. The exhibits herein discussed were not introduced at the trial although the date indicates that said documents were obviously in the appellant's possession in ample time to have been presented.

## VII.

In this alleged point of error raised by the appellant that the prosecuting attorney knowingly, corruptly and deliberately suborned perjury in the testimony of the witnesses produced at the trial of this case, it should be

sufficient to state to the court that a mere reading of the testimony of every witness who appeared at this trial would conclusively negate such an allegation.

### VIII.

Appellant has gone beyond the record to accuse the FBI Agents and the Assistant United States Attorney who tried the case, of gross misconduct. Appellant, however, has not made any citations to the record. His accusations of misconduct are not documented but rest solely upon his own assertions written into his brief. It should be noted that he was represented by an attorney at the trial of the case. In this appeal he is appearing *in propria persona*. Had there been any misconduct in the proceedings before the District Court it may safely be assumed that his trained counsel would have noted them and made timely objection. Likewise it must be assumed that the failure of appellant to support his charges by any reference to the record substantiates the reply of the Government that there was no misconduct and that the record does not show any, and also gives rise to the compelling inference that appellant in his enthusiasm to work up a ground for complaint has imagined grievances which exist only in his own mind and which did not suggest themselves to the learned counsel who conducted the trial on his behalf. However, as the charges made—although loosely made—impute misconduct to the Agents of the Federal Bureau of Investigation and to the prosecuting attorney, appellee does categorically deny each and every accusation of misconduct allegedly committed by the Agents of the Federal

Bureau of Investigation and the Assistant United States Attorney who prosecuted the case. Among the allegations of misconduct charged in Appellant's Opening Brief is the following:

"The appellant now accuses the prosecutor of having produced in court an array of females alleged to have been a 'group of nondescript, garishly attired females, adorned with the gaudiest and cheapest of jewelry, highly painted countenances and giving every evidence by their appearances of being either burlesque-stage habitués or that of bawdy houses. One of their number, in particular, was by far the most conspicuous. She affected daily changes in the mode of her hair arrangements so bizarre as to be beyond word-description and the scantiness of her clothing so extreme as to barely pass for a bathing costume' \* \* \* (AOB 35-37)."

Like the other allegations of misconduct there is no reference to the record. The allegation is denied *in toto*. Even if it were true it is impossible to see what bearing it had upon the trial. The only suggestion that was relevant in any way is the intimation that the questioning of appellant in cross-examination concerning his marital affairs—while the women described in appellant's brief were in the courtroom—in some way suggested that the women in the courtroom had some relationship to the appellant or his affairs. Trials of criminal cases are public proceedings; neither appellee nor appellant has a control over persons who come and go during the conduct of a trial. If appellant had felt during the trial that he was prejudiced by the presence of the women complained of,—that was the time to make objection so that the court could have an opportunity to clarify the situation and take any immedi-

ate steps indicated. The record, however, is barren not only of any objection by appellant but of any indication that any women were present in the courtroom at all, except of course those present on the jury.

### IX.

The ninth point relied upon by the appellant on appeal charges error to the court in admitting testimony which was incompetent, irrelevant, immaterial, improper, redundant, prejudicial and unlawful. This allegation is very broad and is referred to in appellant's opening brief in no specific manner, but he has charged in his opening brief variously that the evidence was insufficient to support the allegations of the indictment and that the evidence was redundant and cumulative to the extent that it became prejudicial by its volume and in revealing prior arrests and fingerprinting, taking into custody, etc., so it would seem that little or no consideration should be given to this alleged error since the statement of facts contained in this brief as applied to each of the counts of the indictment will disclose to the court that all of the testimony of the witnesses produced by the Government was material, was proper, was not prejudicial, was not redundant and was not unlawful, but in view of the circumstances of the case, the type of prosecution and the astuteness of the appellant in fabricating testimony to suit his own purposes was all necessary to establish his guilt beyond a reasonable doubt.

### X.

The allegation that the trial court erred in admitting testimony and exhibits in this point relied upon by the appellant is answered by the explanation to Points No. VIII and No. IX above and would be superfluous and



wasteful of this court's time to reiterate in answering this allegation.

## XI.

It is alleged in the eleventh point that the court erred in failing to grant the motions made by defendant's counsel at the end of the prosecution's main case; that is to say, the motion for a judgment of acquittal on count three of the indictment and succeeding motions. The basis of the first motion was that the testimony of Mr. Wetzel on the stand in the impersonation case on April 22, 1948, was to the effect that *he* went to the bowling alley and cashed the check, whereas he now testifies that *he and the appellant* had gone to the bowling alley and cashed the check.

The court overruled this motion because the testimony does not show any material inconsistency between the testimony of Wetzel in the two cases and that it was competent to go to the jury. The facts are that he testified that he went to the bowling alley with the appellant and endorsed the ten dollar check at the bar which is located in the bowling alley building and is always considered as the same establishment, namely "the bowling alley" because it was under the same management, and had one address. This was also the testimony of the bar tender, and to all intents and purposes was the bowling academy with the bar in connection therewith. There is no controversy over the testimony of Wetzel and the bar tender, that the ten dollar check was cashed at the bar located in the same building, at the same address, as the bowling alley. The objection is entirely without merit because appellant denied ever cashing any check at any time endorsed by Wetzel. Therefore no credit can be given to this contention as related to that motion.

The second motion referred to was properly overruled, that being a motion which had been denied without prejudice by United States District Judge Mathes for the production of a witness from Washington, D. C., namely, the Pardon Attorney, for the reason that it did not conform to Rule 17(b) of the Rules of Criminal Procedure. The trial court properly overruled that motion because under Rule 17(b), Federal Rules of Criminal Procedure, in order for an indigent defendant to secure the attendance of a witness at Government expense by order of court, it is necessary for the defendant to show, among other things, the testimony that would be given by the witness and its materiality to the case at bar. There certainly was no showing of materiality of the Pardon Attorney's testimony or that of Eastus, the former United States Attorney. Accordingly, the trial judge properly overruled the motion as had been done by Judge Mathes before the trial of the case.

The record does not clearly show that the appellant's counsel made a motion for judgment of acquittal on the entire indictment, but the record does disclose [R. III—275] that the court denied all motions made at this time and if an over-all motion for judgment of acquittal on the entire indictment was made, it was properly overruled by the court. Accordingly, there is no merit in the contentions of the appellant that error was committed by the trial court in the eleventh point.

## XII.

The twelfth point cited by the appellant as error by the trial court in failing to grant a motion during the trial for continuance until such time as the prosecutor would produce certain witnesses and evidence in accord-

ance with a stipulation in the record at the inception of the trial is entirely an erroneous citation of error based upon the record, for the reason that there is no showing in the record of the stipulation by counsel that any witnesses or evidence would be produced which was not produced. There was an attempt, however, by the prosecutor to secure the much-talked-of letter allegedly written by Clyde O. Eastus to the Pardon Attorney, and the record will show that the prosecutor was most cooperative in attempting to obtain all evidence possible on behalf of the defendant, even where the same was not considered to be material. In the transcript of the record of the case, Volume III, page 275, it should be noted that Mr. Green, the defendant's attorney, stated: "I submit that Mr. Bell has been cooperative in attempting to obtain the evidence. However, it is an unfortunate delay." There is no prejudice shown by the failure to obtain this evidence because it is obvious from the discussions throughout the trial concerning it that it would not have been material and would not therefore have been admissible in the case. Accordingly, no charge of suppression of the evidence should be given serious consideration nor should serious consideration be given to the appellant's contention that the trial court erred in not granting a continuance for the purposes of obtaining immaterial evidence.

### XIII.

This point raised by the appellant is totally without merit since a mere reading of the facts in evidence as compiled in this brief under the Statement of Facts is sufficient to show that all of the evidence was lawfully admitted and was sufficient to sustain every allegation in every count of the indictment.

#### XIV.

This fourteenth point relied upon by the appellant in his appeal, is like the others,—totally without merit for the reason that the statements made by the prosecutor during the trial were preface remarks advising the jury of the evidence to be produced in support of the allegations and in his argument at the conclusion of the trial, he stayed entirely within the record as shown by the transcript. The alleged willful misconduct, as previously discussed herein, is merely a figment of the appellant's imagination and in no way borne out by the record either by the written report of the trial or the inferences which may be drawn therefrom.

#### XV.

This point relied upon by the appellant is also totally without merit, being simply an allegation of the same alleged misconduct as stated in Point XIV but stated in different words, and apparently refers specifically to the alleged gestures of the prosecutor and the courtroom seating of the female spectators which has previously been discussed and which is obviously a figment of the appellant's imagination and an attempt to mislead this court in consideration of the real issues of the case.

The foregoing disposes of the specific allegations of error and points relied upon by the appellant in this appeal. In the following discussion of appellant's brief, an effort will be made to concisely state to this court the high points of the evidence and to cite the law relating to each of the points considered to be important with regard to admission of evidence and the rulings made by the court during the course of the trial.

## Comments on Appellant's Brief.

At the outset in his statement of facts the appellant has included many matters which are not a part of the record in this case. He recites his background indicating that he was a lawyer in the State of New York for several years in the later twenties and the early thirties, but there is no evidence in the record to show any such qualifications. He also expounds at length about matters concerning alleged fraud by his employer, North American Aviation Company, Inc., in Dallas Texas, which is not properly a part of the record, nor does it have any bearing upon the issues in this case.

In the appellant's opening brief at page 4 he makes accusations against the law enforcement authorities that he was taken from a Dallas County Jail, beaten and abused, and at all times starved, etc., and charges that he was continually mistreated and kept in custody without cause, all of which is not a part of the record in this case, and if it had been a part of the testimony it would have been properly controverted by witnesses for the Government as the charges are utterly untrue. He also alleges on page 6 of his opening brief that while in the company of Clyde O. Eastus, former United States Attorney in Texas, they were fired upon by persons said by Eastus to have been F.B.I. agents, and he gave this as the reason why he received authority from Eastus to carry a gun. There is no testimony even by the defendant in the case that he was fired upon by anyone or that he was mistreated in any manner by law enforcement officers, including F.B.I. agents and United States Marshal, but all of this matter is brought up in appellant's brief and should not receive consideration by this court in connection with the case. It was his privilege and right to have testified to



this at his trial if it were material to the issues of the case, but it is the Government's contention that it is not material in any way to the issues.

Appellant sets forth in his brief at page 9 an alleged order restoring him to duty in the Army of the United States on September 25, 1945. The Army personnel file on the appellant, which are Exhibits 28 and 29 in this case, does not contain any such order, nor is there any exhibit in the record by the appellant of such an order having been issued. He attaches to his motion to vacate an exhibit purporting to be excerpts from Army orders. In connection with the order the appellant states that he was advanced to the rate of Master Sergeant, assigned the detail of Sergeant Major, and served in the South Pacific Theatre of the War. This is contrary to his own testimony as regards the rank or rate which he had because he admitted under direct examination in this case by his own attorney [R. III, 329-32; R. IV, 371-2; that at all times while he was in the Army he was a Private, and it is quite obvious that he knows the difference between being a Private and being a Master Sergeant. He explained that Sergeant Major was not a rank or rate but a military term connoting a certain assignment of duties usually clerical.

On page 10 of his brief he sets forth another alleged Army order dated May 28, 1946 which likewise did not show up in the personnel file of the Army pertaining to appellant and is not evidenced by any such exhibit in the trial of this case by either the Government or by the appellant himself.

On page 11 of appellant's brief he accuses the F.B.I. agents of arresting him and taking valuable papers away

from him on December 15, 1946 upon a public street in Los Angeles. This charge is unfounded. He did not make these accusations in his testimony at the trial of the case or it could have been and would have been controverted by testimony of the F.B.I. agents in rebuttal. He raises these matters for the first time upon appeal.

On page 12 he recites matters concerning threats made against him by former associates in his employment in Dallas, Texas, in connection with the various cases in court in that jurisdiction which also were not a part of the record in this case. On this same page of his brief he states that his wife filed an action against F.B.I. Agent Spencer for having assaulted her and that he was thereafter visited at the county jail by two F.B.I. agents who attempted to secure a signed statement from him absolving Agent Spencer of any wrongdoing in the matter and upon his refusal to do so he was threatened with bodily harm and would be re-indicted for a dozen counts of perjury. All of this is denied and is a matter which was not testified to in the case by him or any witness, and if it had been testified to by him at the trial of the case and had been permitted as relevant matter, it would have been refuted by testimony of the agents who were available to the Government and would have been called in rebuttal.

On page 14 of his brief the appellant sets forth the fact that thirty prosecution witnesses were produced in the trial and that twenty of them were law enforcement officers or Government employees and he intimates that he was denied a fair trial because only he and his wife were witnesses for him at the trial of his case as against the testimony of all these Government attachés. This contention of course is wholly without merit since every witness called was called for a particular purpose and

gave testimony freely and voluntarily and was cross-examined by appellant's attorney who was in constant conference with appellant and whose handling of the case was to a great degree controlled by appellant himself as to form and manner in which the various witnesses were handled in behalf of the appellant.

On page 15 of his brief the contention is made that the items of perjury contained in the indictment and based upon the testimony of the appellant at his former trial in Judge Weinberger's court were not matters material to the issues in said trial. It is of course quite obvious that they were matters material to the issues in that trial because those very perjured statements by the appellant in that former trial were obviously, when considered by the jury, of great weight in convincing the jury of a reasonable doubt of his guilt in the former trial which resulted in an acquittal. If those perjured statements could have been anticipated at the time of the former trial and controverted therein as they were in this trial, he undoubtedly would have been convicted because his impeachment as a credible witness at the former trial would have been complete.

On page 17 of his brief he attempts to argue that statements made in explanation of an answer cannot be deemed to be perjury. It should be borne in mind, however, that the oath is to tell the truth, the whole truth and nothing but the truth, and thus any statements which are false and misleading and knowingly made by the witness is of course perjury and material as the answer to the main question. He is quibbling over terms such as "federal employee," "conviction for murder or manslaughter," etc. His arguments on this point on the page cited and succeeding pages have no basis for serious con-

sideration by this court. Likewise, his argument on page 19 concerning the words of the indictment, in which he cites *Hogue v. U. S.*, 184 Fed. 245, and *Wharton's Criminal Law*, Vol. 2, Sec. 1552, contending the indictment should use the words "feloniously and corruptly," etc., is not convincing that there was any deficiency in the indictment in this case. He has said on the same page of his brief that there is no affirmative allegation that he swore either falsely or corruptly, or that there is any affirmative allegation that any of the alleged statements by the appellant was false. The use of these terms would be merely surplusage since they are in the nature of conclusions and a mere reading of the indictment as heretofore stated will show that he is charged affirmatively with having knowingly and wilfully made statements which are untrue and that he then and there knew they were untrue. These words alone are sufficient to sustain the indictment.

We do not dispute the contention of the appellant that there can be nothing charged in an indictment by implication or intendment and that every part in the indictment must be certain, clear and unambiguous, in support of which he cites *U. S. v. Potter*, 56 Fed. 83, and *U. S. v. Philadelphia and Reading Railroad Company*, 232 Fed. 953-955, but there is no such deficiency in the indictment in this case; every allegation is charged clearly and unambiguously. It is obvious by the reading of the indictment that it conforms to 18 U. S. C. 558, and the appellant's contention that it does not is obviously without merit.

His contention page 22 of his brief that there was duplicity in the various counts because more than one statement of perjury was included therein is likewise

totally without merit. The cases cited by the appellant do not support his contention of duplicity.

Appellant's contention on page 24 of his brief that the introduction of the numerous fingerprint cards was erroneous for the reason that it was incompetent, irrelevant, immaterial, and that the evidence was redundant and highly prejudicial, is totally without merit for the reason that the record discloses clearly that the cards containing his fingerprints were introduced into the record as positive proof that he was at certain places at certain times and could not have been at places he had testified he was on those certain dates, thus tending to positively prove by overwhelming evidence that he was testifying falsely, and the large number of instances wherein he was placed at certain geographical locations and in the presence of certain persons proved additionally that when he made the false statements in his previous testimony he knew full well that he was testifying falsely.

On page 27 of appellant's brief he states that it is the rule with regard to proof of former convictions that such former convictions and the proof thereof is irrelevant and immaterial and therefore not admissible and that proof of offenses other than those charged in the indictment is generally inadmissible and constitutes prejudicial error even though the separate offenses may be of a similar nature. In general this is probably true, but proof of a prior conviction is admissible not only to impeach the credibility of a witness but also to show, (1) motive, (2) intent, (3) the absence of accident or mistake, (4) or a common scheme or plan.

*Gordon v. U. S.*, 254 Fed. 53;

*McDonald v. U. S.*, 264 Fed. 733;

*Paris v. U. S.*, 260 Fed. 529.



It was obviously necessary, as the court will recognize, because of the nature of this prosecution, to introduce documents for the purpose of proving the allegations in this case, which incidentally indicated other convictions but which were not introduced for the purpose of proving the prior convictions even for the purposes of impeachment. The fact that other convictions came before the jury was merely incidental, and relevant evidence in a case of this nature cannot be denied admissibility for such a reason. Additionally, it should be noted by the court that the trial judge's instructions were complete and clear to the jury with regard to the purpose for which this evidence as a whole was introduced, and the jury were instructed to not give extra weight to evidence simply because there is more of it but it is to be weighed for its veracity and importance and for its authenticity. Accordingly, no prejudice to the defendant resulted from the introduction of Federal Bureau of Investigation identification records or similar records of other law enforcement agencies. Consequently the allegations by the appellant in his brief of the details concerning these exhibits need not be discussed in this answer to any great extent.

Previously discussed in this brief is the matter of the conduct of the prosecutor, particularly referring to Appellant's Opening Brief, pages 35 and 36. In the interest of brevity these pages are not reproduced here, but the court's special attention is directed to a close reading of those two pages of fiction. The appellant at that point in his brief has fabricated a fictional story without one scintilla of truth except that the two women to which he refers admittedly were extremely attractive in their attire. Their attire, however, was entirely conventional in every respect and, since they were perhaps the only spectators

who sat throughout the trial, provided a subject for this appellant's imagination to run away with him. One of the ladies was the wife of the prosecutor, the other was a friend of hers, and the uniqueness of the situation involved in this trial was such that they had a special interest in attending and, more especially, because of the personal interest in observing the prosecutor at work. It is categorically denied that the prosecutor ever made gestures toward the spectators or any of them or that either of the ladies ever arose from her seat to make any menacing motions or any other motions during the trial of the case. These allegations alone should convince this court of the caliber of mind possessed by this appellant and in itself is ample reason for this court to affirm the conviction in this case when due consideration is given to the fact that a jury of twelve men and women observed him throughout the trial in which they heard the evidence presented and voted a verdict of conviction on every count in the indictment. It should be obvious to this court that if the prosecutor's actions at the trial of this case ever approached to the slightest degree the alleged misconduct stated by this appellant on these two pages of his brief to be true facts, there would have been numerous objections by defense counsel, and at the same time there is little likelihood that any federal judge would have permitted the slightest amount of such misconduct to have occurred in his court room. Yet no place in the entire record of this case was there any objection made to the conduct of the prosecutor, nor for that matter the conduct of the defense counsel.

The appellant charges (AOB 38) that his certificate of service from the Army was stolen from him prior to the trial of Cause No. 19209 (the impersonation case in

April, 1947 before Judge Weinberger) by Federal Bureau of Investigation Agents Angel and Irwin and was in possession of the prosecutor throughout the trial of that case. He further states that he went on trial in this case upon the assurance of his counsel that the prosecutor had the said service record and would produce same to him at the trial. In his brief, appellant has referred to testimony given by him at the trial that FBI Agents Angel and Irwin took his service certificate from him. This is not true and the record does not reflect that he so testified. The record does show that appellant did testify that FBI agents had taken numerous papers from him and that these papers were never returned to him. He did not specify what those papers were. In the absence of his ability to state what was taken from him it was impossible for Government witnesses to specify what papers they did not take from him. The rebuttal was therefore as broad as the accusation. Furthermore, appellant made no request either before or during the trial for the production of any documents which he contended had been taken from him.

The facts are that on December 8, 1946, Federal Bureau of Investigation Agents Angel and Irwin, referred to by the appellant, visited the appellant and his wife in their room in a hotel at 729 South Bonnie Brae Street, Los Angeles, California. He voluntarily produced his draft board registration card, and with his permission the card was retained by Agent Angel.

In the motion to vacate the judgment made by this appellant and being considered with this appeal on pages 2 and 3 the appellant states that about the 15th of December, 1946, appellant was "picked up" by two F.B.I. agents and detained in the room of a nearby office building for a period of some three to five hours. This is not in any

manner a true statement of fact. The facts are in this connection that the appellant called at the Los Angeles office of the Federal Bureau of Investigation on December 12, 1946 and voluntarily furnished a signed statement. He was not searched, no papers of any kind were taken from him, and the statement was furnished to Special Agent Angel alone. He was not questioned by any other person and at no time was he "picked up" or taken into custody and detained at an office building and later taken to the Los Angeles Federal Bureau of Investigation office. During the interview on December 12, 1946, which lasted approximately two hours, Special Agent John J. Sullivan was present.

With regard to the appellant's arrests there was a warrant issued by the United States Commissioner at Los Angeles on December 17, 1946, on a complaint charging impersonation. It was two months and ten days thereafter (February 27, 1947) that the appellant was arrested at Sacramento, California, by Federal Bureau of Investigation agents on this warrant. The appellant had then been a fugitive using the alias of Jerry Arthur Lee, and when brought before the United States Commissioner on removal proceedings was identified by the testimony of a finger print expert to the effect that the finger prints of Arthur Lee Flynn on a previous occasion were identical with the finger prints of Jerry Arthur Lee arrested on that occasion. He then went to trial in the impersonation case from which grew the charges of perjury which are the subject of this prosecution and appeal; and after he was acquitted on his perjured testimony at the impersonation case tried before Federal Judge Weinberger in Los Angeles on April 22 and 23, 1947, Assistant United States Attorney Paul Fitting, who conducted the prosecu-

tion in the impersonation trial, authorized a complaint and the arrest of the appellant for the commission of the perjury in the said impersonation trial.

In pursuance of this authorization, F.B.I. Agent Jack Spencer, in whose presence the felony of perjury was committed, arrested the appellant at 3836 West Avenue 43, Los Angeles, California, about 7:30 p. m. on April 23, 1947. This arrest was made after the hours for filing a complaint and was made jointly by Agent Jack Spencer and Agent Carol Doyle. The said arrest was made promptly and without a warrant for the reason that the agents had knowledge of the appellant's prior successful attempts to avoid arrest and with the reasonable assumption that he would again become a fugitive. At the time of the arrest the appellant's wife was present and attempted to interfere with the arrest. No force was used against her or any attack made on her person by the arresting agents but, nevertheless, on April 25, 1947, she filed a civil action against F.B.I. Agent Jack Spencer for assault. This suit was wholly without merit and the agent was defended by the United States Attorney's office in the Southern District of California before the Superior Court for Los Angeles County, and subsequently the action was dismissed on the motion of plaintiff's attorney Robert H. Green, March 6, 1948. It should be noted that Robert H. Green is the attorney of record for the appellant in this case. Subsequent to the arrest on April 23, 1947, and at the earliest possible date and hour the authorized complaint was filed before U. S. Commissioner Head in Los Angeles, California, by F.B.I. Agent Spencer, this being on the morning of April 24, 1947, and a warrant issued thereon. The appellant was arraigned at 10:30 a. m. on the same date and upon the preliminary hearing,



sufficient cause being found by the Commissioner, the appellant was bound over to the grand jury, who subsequently indicted him in the seven counts of perjury which is the subject of this trial and appeal.

In connection with the matter of the charges against F.B.I. Agent Spencer in the civil action, the Court's special attention is directed to Appellant's Opening Brief, pages 12 and 13, wherein the appellant accuses the Federal Bureau of Investigation agents of conduct which accusations are obviously so ridiculous that this Court could give no serious consideration to them, and especially after seeing the inconsistencies of this appellant's statements, both under oath and otherwise, revealed time after time in the record of this case.

### **Conclusion.**

In conclusion let it be said that the evidence presented by the Government in the trial of this case is obviously competent, relevant and material in every instance. It is admissible without a question of doubt in every instance. It is cumulative to a high degree although in no manner superfluous to prove the allegations of the indictment. The mere fact that prior offenses committed by this appellant were incidentally revealed by the evidence is not reason for reversal on account of prejudicial error.

The contentions of the appellant that he was denied the production of evidence necessary to his defense by fraud and deceit practiced upon him and his counsel by the prosecutor is by the record totally unwarranted and without merit and revealed by the record itself.

The allegations made in the Appellant's Opening Brief and in his motion to vacate the judgment that he was beaten, that he was threatened, that he was robbed and

illegally searched and that papers were illegally seized from him, and that he was otherwise generally mistreated by the agents of the Federal Bureau of Investigation and others, are allegations wholly without merit not supported by the record even in his own testimony under oath or otherwise. Thus the appellant's obvious attempt to befog the issues in his false castigation of the Government's representatives, and his attempt to show that he was persecuted rather than prosecuted, will undoubtedly be considered by this Court in its proper light and be given no serious consideration.

Accordingly the record sustains the conviction to every count of the indictment; the trial court did not err in the admission of evidence in any manner or to any degree prejudice the rights of this appellant. The record clearly bears out the conclusion that he had a fair and impartial trial and was duly convicted by a jury after having been given his day in court with all possible safeguards to his constitutional rights.

Respectfully submitted,

JAMES M. CARTER,  
*United States Attorney,*

ERNEST A. TOLIN,  
*Chief Assistant U. S.*  
*Attorney,*

D. WENDELL REID,  
*Special Assistant U. S.*  
*Attorney,*  
*Attorneys for Appellee.*



No. 11,721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

RICHARD A. NUMER,

*Appellant,*

VS.

R. J. MILLER, Associate Warden, et al.,  
United States Penitentiary, Alca-  
traz, California, et al.,

*Appellees.*

BRIEF FOR APPELLEES.

---

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,  
Post Office Building, San Francisco, California,

*Attorneys for Appellees.*





## Subject Index

---

	Page
Jurisdictional statement .....	1
Statement of the case .....	2
Question .....	4
Contention of appellees .....	4
Argument .....	4
Summary .....	6
Conclusion .....	7

---

## Table of Authorities Cited

---

Cases	Pages
In re Stewart, N.D. Cal. S.D., 1 F.R.D. 105.....	5
Kelly v. Dowd (CCA-7), 140 F. (2d) 81, 83, certiorari denied, 320 U.S. 786 .....	6
Platek v. Aderhold (CCA-5), 73 F. (2d) 173, 175.....	6
Reilly v. Hiatt, 63 F. Supp. 476.....	6
Sarshik v. Sanford (CCA-5), 142 F. (2d) 676.....	6
Snow v. Roche, Judge (CCA-9), 143 F. (2d) 718, certiorari denied, 323 U.S. 788.....	6
Youngblood v. United States, 141 F. (2d) 912, 914.....	5

### Statutes

Title 18 U.S.C.A., Section 753(a) .....	2, 5
---	------

### Rules

Rules of Civil Procedure for District Courts, Rule 81(b) 28 U.S.C.A., following Section 723(c) .....	5
--	---



No. 11,721

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

RICHARD A. NUMER,

*Appellant,*

VS.

R. J. MILLER, Associate Warden, et al.,  
United States Penitentiary, Alca-  
traz, California, et al.,

*Appellees.*

## BRIEF FOR APPELLEES.

---

### JURISDICTIONAL STATEMENT.

The method by which appellant (an inmate of the United States Penitentiary at Alcatraz Island, California) seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the Court below" and the jurisdiction of this Honorable Court to review the decision of the Court below denying appellant's petition for mandatory relief against the prison authorities of the said penitentiary, is set forth in the said appellant's jurisdictional statement on page 1 of his opening brief.

**STATEMENT OF THE CASE.**

The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, instituted an action in the nature of a petition for writ of mandamus, to compel the prison authorities of the said penitentiary to allow him to take a correspondence course in English at the University of California. (Tr. 1-8.) An order to show cause thereupon issued (Tr. 10) and the appellees filed a motion to dismiss, asserting that the said application failed to state a cause of action. (Tr. 11.) The matter was then set for hearing on the motion to dismiss and the Court below ordered the appellant produced in Court for hearing. (Tr. 15.) Thereafter the matter was heard, the petitioner stating the reasons, both factual and legal, for his application, and the appellees arguing that the relief sought involved an exercise of discretion under the rules promulgated for the governance of penal institutions in accordance with the provisions of Title 18 U.S.C.A., Section 753a. (Tr. 16-28.) It was conceded by appellees that they have permitted certain other inmates to take correspondence courses. The matter was then submitted and the Court below entered the following order denying petition for writ of mandamus and discharging the order to show cause:

“The petitioner, an inmate of the United States Penitentiary at Alcatraz Island, California, seeks by petition for writ of mandamus to compel the prison authorities to grant him the right to take a correspondence course in English at the University of California. In moving to dismiss the petition on the ground that the said application

fails to state a cause of action upon which relief can be granted, the respondents argue that their actions involve an exercise of their discretion under the rules promulgated for the governance of penal institutions in accordance with the provisions of Title 18 U.S.C.A., Section 753a.

This contention of the respondents is sound since it is well settled that it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.

Sarshik v. Sanford, (CCA-5), 142 F. (2d) 676;

Platek v. Aderhold, (CCA-5), 73 F. (2d) 173, 175;

Kelly v. Dowd, (CCA-7), 140 F. (2d) 81, 83, certiorari denied, 320 U.S. 786.

Ordered that the petition for writ of mandamus be, and the same is hereby, dismissed, and that the order to show cause be, and the same is hereby, discharged.

Dated: April 17th, 1947.

Michael J. Roche,  
United States District Judge".

(Tr. 30-31.)

From this latter order appellant appeals to this Honorable Court. (Tr. 37.)



**QUESTION.**

May the prison authorities of a United States penitentiary deny an inmate permission to take a correspondence course in English while permitting certain other inmates to take the course?

---

**CONTENTION OF APPELLEES.**

The answer to the above stated question is: Yes.

---

**ARGUMENT.**

This is not the first time that the appellant has unsuccessfully sought redress of the Courts to compel the authorities at Alcatraz penitentiary to grant him what he insists are his rights.

In case No. 25,025-R, United States District Judge Michael J. Roche denied appellant's request that he be granted certain purchase privileges. In case No. 25,037-S, United States District Judge A. F. St. Sure denied appellant's application for certain recreational privileges.

In case No. 25,070-G, United States District Judge Louis E. Goodman denied appellant's application that he be allowed to retain certain articles of personal property, and in case No. 26,212-G Judge Goodman denied appellant's application for certain medical privileges.

It should also be noted that all of these applications were filed in the United States District Court for the

Northern District of California within a period of less than a year during 1945 and 1946.

The appellees have narrowed the issues involved herein to the sole question as to whether the prison authorities of a United States penitentiary may deny an inmate permission to take a correspondence course while permitting certain other inmates to take the course, although the instant application might properly have been denied in view of the abolishment of writs of mandamus.

See

*Rules of Civil Procedure for District Courts,*  
Rule 81(b), 28 U.S.C.A., following Section  
723(c).

See also

*In re Stewart*, N.D.Cal. S.D., 1 F.R.D. 105;  
*Youngblood v. United States*, 141 F. (2d) 912,  
914.

Title 18 U.S.C.A., Section 753a reads in pertinent part as follows:

“The Bureau of Prisons shall have charge of the management and regulation of all Federal penal and correctional institutions and be responsible for the safekeeping, care, protection, instruction and discipline of all persons charged with or convicted of offenses against the United States \* \* \*”.

Under authority of this statute the action of the appellees involved an exercise of discretion under the rules promulgated for the governance of inmates of Federal penal institutions. Certainly such action was

in no sense an abrogation of a personal right or a constitutional guaranty, as for example, a denial of access to the Courts. Thus the remedy sought by appellant would not lie.

See

*Snow v. Roche* (Judge), (CAA-9), 143 F. (2d) 718, certiorari denied, 323 U.S. 788;  
*Reilly v. Hiatt*, 63 F. Supp. 476.

Furthermore, as the Court below indicated in its order denying appellant's application for a writ of mandamus, it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries but only to deliver from imprisonment those who are illegally confined.

*Sarshik v. Sanford*, (CCA-5), 142 F. (2d) 676;  
*Platek v. Aderhold*, (CCA-5), 73 F. (2d) 173, 175;  
*Kelly v. Dowd*, (CCA-7), 140 F. (2d) 81, 83;  
 certiorari denied, 320 U.S. 786.

---

### SUMMARY.

The appellant has had unrestricted access to the courts to air his grievances, even though they are without foundation. In refusing appellant permission to take a correspondence course, the prison authorities did not deprive him of any constitutional right or guaranty but rather properly exercised a discretion conferred by statute. Therefore, the Court below, in

denying appellant's petition for writ of mandamus, correctly held, as it did, that it is not the function of the courts to interfere with the treatment or discipline of prisoners but only to deliver from imprisonment those who are illegally confined.

---

**CONCLUSION.**

In view of the foregoing it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,  
November 5, 1947.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

*Attorneys for Appellees.*





No. 11722

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG AND CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY,  
a Corporation,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

NOV 26 1947

PAUL F. O'BRIEN,  
CLERK



No. 11722

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG AND CLYDE PHILP,  
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

---



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Adoption of Points on Appeal.....	115
Amended Complaint .....	2
Exhibit A—Itemized Rental Statement...	7
Answer to Amended Complaint.....	10
Answer and Cross-Complaint .....	12
Appeal:	
Notice of.....	52
Statement of Points on.....	53
Bond for Costs on .....	55
Adoption of Points on.....	115
Bond for Costs on Appeal.....	55
Clerk's Certificate .....	57
Deposition of Clyde Philp:	
—direct .....	31
Exhibits, Defendant Continental Casualty Co's:	
No. 1—Application for 1062.....	67
No. 2—Application for 1068.....	80
Exhibits, Defendants' Macri:	
No. 1—Joint Venture Agreement with Re- spect to 1062.....	92
No. 2—Joint Venture Agreement with Re- spect to 1068.....	100



Exhibit, Defendants' Goerig and Philp:	
No. 1—Termination Agreement . . . . .	108
Exhibits, Plaintiff's:	
A—Contract and Bond with Respect 1062.	58
B—Contract and Bond with Respect 1068.	62
Findings of Fact and Conclusions of Law . . . . .	39
Conclusions of Law . . . . .	45
Findings of Fact . . . . .	39
Judgment . . . . .	47
Motion for New Trial . . . . .	49
Names and Addresses of Attorneys of Record . .	1
Notice of Appeal . . . . .	52
Order Denying Motion for New Trial . . . . .	51
Order on Pre-Trial . . . . .	17
Record of Proceedings at the Trial . . . . .	19
Witnesses, Defendants':	
Goerig, A. J.	
—direct (adverse) by Mr. Holman	20
—direct by Mr. Hawkins . . . . .	22
—cross . . . . .	28
Reply and Answer to Answer and Cross-Com- plaint of Continental Casualty Company . . . .	15
Statement of Points on Appeal . . . . .	53

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

BROWN & HAWKINS,

Miller Building,

Yakima, Washington.

Attorneys for A. J. Goerig & Clyde Philp,  
Defendants and Appellant.

SKEEL, McKELVY, HENKE, EVENSON &  
UHLMANN,

Insurance Building,

Seattle 4, Washington.

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

District Court of the United States for the Eastern  
District of Washington, Southern Division

No. 250

UNITED STATES OF AMERICA for the use and  
benefit of H. H. WALKER, INC., a California  
Corporation,

Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY, a cor-  
poration, SAM MACRI, JOE MACRI and  
DON MACRI, A. J. GOERIG and CLYDE  
PHILP, doing business under the name and  
style of MACRI & COMPANY,

Defendants.

### AMENDED COMPLAINT

For cause of action against the defendants herein,  
the plaintiff alleges as follows:

#### I.

This action is brought under the Act of Congress  
of August 24, 1935, being Sections 270-a, 270-b,  
270-d, Title 40 of the United States Code Annotated,  
commonly known as the Miller Act, and is brought  
in the name of the United States of America for  
the use of the plaintiff named in the caption hereof  
against the defendants herein for and on account  
of the matters hereinafter set forth.

## II.

H. H. Walker, Inc., the beneficial plaintiff, is a California corporation, duly organized *the* existing, and is authorized to do business in the State of Washington and has paid all of its license fees due so as to entitle it to transact its business within the State of Washington.

## III.

The defendant, Sam Macri, is an individual who carries on a contracting business under the name and style of Macri & Company and that the said Macri & Company is a co-partnership and that the names of the other partners are as follows: A. J. Goerig, Clyde Philp, Don Macri and Joe Macri.

## IV.

That the Continental Casualty Company is a corporation duly organized, existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business at Hammond, Indiana, and is engaged generally in the business of writing surety bonds and becoming surety on such bonds written for any party who pays unto it the regular required premium therefor, and is duly licensed and authorized to and is transacting such business in the State of Washington and has been at all times herein mentioned.

## V.

That the defendant, Sam Macri, for and on behalf of himself and for and on behalf of the afore-

said co-partners entered into a contract with the United States of America, through the United States Bureau of Reclamation for the completion of certain work known as Roza Division, Yakima Project, Specification No. 1068, in the vicinity of Prosser, located in Benton County, Washington. That said contract is a public record on file with the General Accounting Office of the United States and is known and designated by said number above specified.

## VI.

Pursuant to the Act of Congress as aforesaid, and the Statutes applicable hereto, the defendant, Sam Macri and the other partners heretofore referred to furnished and executed to the United States, a payment bond pertaining to the operations of said Sam Macri and the partnership known and designated as Macri & Company in the performance of said contract, and the defendant, Continental Casualty Company, a corporation, became surety for said Sam Macri and the partnership known and designated as Macri & Company, thereon; that said bond is a public record in the General Accounting office of the United States and it was conditioned for the protection and payment of all persons supplying labor and material to said principal contractors in the prosecution of the work provided for in said contract, all in accordance with the Laws of the United States and the Statutes thereof, as hereinbefore referred to. That the plaintiff will supply a copy thereof duly certified



if required and directed to do so, and if it becomes necessary.

## VII.

That thereafter, or on or about March, 1945, the said defendants, Sam Macri, and the co-partnership designated as Macri & Company, entered into a rental agreement with the beneficial plaintiff, H. H. Walker, Inc., to furnish certain equipment which was necessary to complete the work under the aforesaid contract and that said equipment which was rented was used by the defendants to complete the aforesaid contract. That an itemized statement of the equipment which was rented, together with the reasonable and agreed value for said rental together with the dates on which said rental became due is more fully and particularly set out in Exhibit "A" attached to this complaint and by this reference said Exhibit "A" is made part of the allegations of this complaint the same as though fully set out herein.

## VIII.

That in accordance with the terms of said rental agreement and upon the direction of the defendants, the beneficial plaintiff did furnish the use of said equipment, as heretofore more particularly alleged and became entitled to receive from the defendants the total amount of \$4,141.62. That the defendants in this case have wholly failed and refused to pay the plaintiff any portion of the sum which was agreed to be paid unto them for the rental of said equipment, as agreed; and that the same is now due and owing unto the plaintiff.

Wherefore the beneficial plaintiff prays judgment against the defendants, and each if them, in the full sum of \$4,142.62, together with interest thereon at the legal rate from the date on which the said rentals became due and for their costs and disbursements in this action expended.

Dated this 28th day of February, 1946.

MURRAY & HEDGCOCK,

By A. W. MURRAY,

Attorneys for Plaintiff.

United States of America,

State of Washington, County of King—ss.

William B. Walker, being first duly sworn on oath deposes and says: That he is the Vice President of the plaintiff, H. H. Walker, Inc., and that he is authorized to make this verification for and on behalf of said corporation; that he has read the above and foregoing complaint of the said H. H. Walker, Inc., knows the contents thereof and that the same is true as he verily believes.

WILLIAM B. WALKER.

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal]

HOWARD W. HEDGCOCK,

Notary Public in and for the State of Washington,  
residing at Seattle.

Received March 6, 1946. Skeel, McKelvy, Henke, Evenson and Uhlmann, Insurance Bldg., Seattle.

Copy received March 6, 1946. Brethorst, Holman, Fowler & Dewar, Attorneys for Defendants Macri.

## EXHIBIT "A"

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. S 958; Equipped with "A-Frame" Boom and Double - Drum Winch; May 1, 1945 to May 31, 1945, Inclusive:

One Month @ \$375.00 per Month..... \$375.00

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S 1594: May 1, 1945, to May 31, 1945, inclusive:

One Month @ \$250.00 per Month..... 250.00

Rental of our Bucyrus-Erie 10-B,  $\frac{3}{8}$ -Yard, Drag Shovel, Gas Engine Operated, Serial No. 22974; May 1, 1945 to May 31, 1945, inclusive:

One Month @ \$440.00 per Month..... 440.00

---

Due May 31, 1945..... \$1,065.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. S-958; Equipped with "A-Frame" Boom and Double - Drum Winch; June 1, 1945 to June 30, 1945, inclusive:

One Month @ \$375.00 per month..... 375.00

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S-1594; June 1, 1945 to June 30, 1945, inclusive:

One Month @ \$250.00 per month..... 250.00

Rental of our Bucyrus-Erie 10-B Drag Shovel,  $\frac{3}{8}$ -Yard, Gas Engine Operated, Serial No. 22974: June 1, 1945 to June 9, 1945:

9/30ths Month @ \$440.00 per month..... 132.00

---

Due June 30, 1945..... 757.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-

436; License No. TS-958; Equipped with "A-Frame" Boom and Double-Drum Winch: July 1, 1945 to July 31, 1945, inclusive:

One Month @ \$375.00 per Month.....	375.00	
Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S-1594: July 1, 1945 to July 31, 1945, inclusive:		
One Month @ \$250.00 per Month.....	250.00	
Due July 31, 1945.....		625.00

To reimburse us for repairs to our equipment which you have on rental; said repairs having resulted from breakdowns caused by lack of essential lubrication while the equipment was in your possession and working on your job or jobs in the vicinity of Prosser, Washington:

Thornton-Ford Six-Wheel Truck,

Our No. 96:

Parts and Outside Work.....	\$93.33	
Labor & Expense.....	40.00	
		133.33

Walter Truck with "A-Frame"

Boom, Our No. 90:

Parts and Outside Work.....	\$111.76	
Labor & Expense.....	45.00	
		156.76

Sales Tax .....	8.70	
-----------------	------	--

Due August 17, 1945.....		298.79
Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. TS-958; Equipped with "A-Frame" Boom and Double-Drum Winch: August 1, 1945 to August 31, 1945, inclusive:		
One Month @ \$375.00 per Month.....	375.00	
Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No.		

99T406311, Thornton Serial No. 3768, License No. TS-1594; August 1, 1945 to August 31, 1945, inclusive:

One Month @ \$250.00 per Month..... 250.00

Due August 31, 1945 ..... 625.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436, License No. TS-958; Equipped with "A-Frame" Boom and Double - Drum Winch: September 1, 1945 to September 30, 1945, inclusive:

One Month @ \$375.00 per Month..... 375.00

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. TS-1594: September 1, 1945 to September 30, 1945, inclusive:

One Month @ \$250.00 per Month..... 250.00

Due September 30, 1945 ..... 625.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. S-958; Equipped with "A-Frame" Boom and Double - Drum Winch: October 1, 1945 to October 7, 1945, inclusive:

7/30ths of One Month

@ \$375.00 per month..... 87.50

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S-1594: October 1, 1945 to October 7, 1945, inclusive:

7/30ths of One Month

@ \$250.00 per Month..... 58.33

Due October 7, 1945..... 145.83

\$4,141.62

Filed March 7, 1946.



[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for answer to plaintiff's amended complaint admit, deny and allege as follows:

1.

For answer to paragraph 1 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

2.

For answer to paragraph 2 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

3.

For answer to paragraph 3 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained and particularly deny that these answering defendants were associated with Sam Macri, Joe Macri or Don Macri as co-partners or as joint adventurers. These answering defendants allege that any relationship between these answering defendants and the other said individual defendants was terminated prior to the incurring of the liability, if any, alleged in said amended complaint.

4.

For answer to paragraph 4 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

5.

For answer to paragraph 5 of plaintiff's amended

complaint these answering defendants deny each and every allegation therein contained.

6.

For answer to paragraph 6 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

7.

For answer to paragraph 7 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's amended complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against H. H. Walker for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants A. J.  
Goerig and Clyde Philp.

Service accepted and copy received of the foregoing Answer to Amend Complaint this 24th day of March, 1946.

MURRAY & HEDGCOCK,

By /s/ HOWARD W. HEDGCOCK,

Attorneys for Plaintiff.

Filed May 17, 1946.

[Title of District Court and Cause.]

## ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's Amended Complaint admits, denies and alleges as follows, to wit:

### First Defense

#### I.

This answering defendant admits Paragraphs I, II, III, IV, V and VI of plaintiff's complaint.

#### II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs VII and VIII and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$4141.62 or any other sum whatsoever or at all.

### Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to wit:

#### I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length para-

graphs I, II, III, IV, V, and VI of plaintiff's complaint. Plaintiff states that payment bond with reference to Contract No. 1068 was issued by Continental Casualty Company May 18, 1944 and was in the amount of \$84,833.75.

## II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

## III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Com-

pany, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney's fees, against each of the above named co-partners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff's complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By WILLARD E. SKEEL.

United States of America,  
State of Washington, County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he



makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 7th day of March, 1946.

[Seal] K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Copy received 3/11/46.

BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
Attys. for Defts. Macri.  
MURRAY & HEDGCOCK, fml

Filed March 13, 1946.

---

[Title of District Court and Cause.]

REPLY AND ANSWER TO ANSWER AND  
CROSS-COMPLAINT OF CONTINENTAL  
CASUALTY COMPANY

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for reply and answer to the Answer and Cross-Complaint of Con-

tinental Casualty Company, a corporation, admit, deny and allege as follows:

1.

For reply to paragraph 1 and 2 of the defendant's first defense these answering defendants deny each and every allegation admitted by said defendant therein.

2.

For answer to paragraph 1 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained or therein replied to.

3.

For answer to paragraph 2 of said cross-complaint these answering defendants deny the same and each and every allegation therein contained, and particularly deny that the defendant Macri & Company executed and signed any application directed to the Continental Casualty Company for and on behalf of these answering defendants.

4.

For answer to paragraph 3 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully replied and answered to defendant Continental Casualty Company's answer and cross-complaint pray that these answering defendants

have and recover judgment against said defendant Continental Casualty Company for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants A. J.

Goerig and Clyde Philp.

Filed July 15, 1946.

---

[Title of District Court and Cause.]

#### ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Howard W. Hedgcock appearing as attorney for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorney for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company;

It is stipulated that any party to this cause may offer in evidence any of the documents marked for identification in cause No. 267 without objection as to signatures and authenticity of such document.

It is further stipulated that the use plaintiff is entitled to judgment in the amount of \$3842.83 without any question of interest being involved and subject to the judgment being appropriately fixed as to judgment debtors and that all the claim is on specification # 1068.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1," pertaining to Specifications # 1062 and # 1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 251, 255, 257 and 267 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,  
United States District Court.

Filed Jan. 27, 1947.

---

[Title of District Court and Cause.]

## RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered, that on the 21st day of February, 1947, the above entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the plaintiff not appearing; the defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington, the defendant Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvey, Henke, Evenson, & Uhlmann, of Seattle and the following proceedings were had:

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if



we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness.

### A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here?      A. Yes.

(Testimony of A. J. Goerig.)

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying is the same bank all the time, your Honor, Seattle First National Bank.

A. Oh, it was—I couldn't say; it was over a year ago, I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

(Testimony of A. J. Goerig.)

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

### A. J. GOERIG

recalled as a witness in his own behalf, resumed the stand and testified further as follows:

#### Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what it is in his hands, for the purpose of the record. How is the appellate court going to know?

(Testimony of A. J. Goerig.)

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburgh and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you?      A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it be stricken.

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as co-partners transacting business under the name of Goerig and Philp, and as co-partners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburgh, and in the writ of garnishment and com-

(Testimony of A. J. Goerig.)

plaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really the owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that



(Testimony of A. J. Goerig.)

purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the best evidence; it is not competent evidence.

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third party creditors, that is, the plaintiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

(Testimony of A. J. Goerig.)

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

### Direct Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

Q. Did you have anything to do with those jobs? A. No.

Q. Did Mr. Philp have anything to do with those jobs? A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No.

(Testimony of A. J. Goerig.)

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs?           A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with those jobs?

A. The Macri Company.

Q. That is——           A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to plaintiff's C, D, E, F, G, H, I, J, K?

A. No, I never saw any of them.

Q. Your answer was no?           A. No.

Q. That they were never called to your attention. Where did you and Mr. Philp maintain your office at the time these jobs were in progress?

A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office?           A. Yes.

Q. Where was that located?

(Testimony of A. J. Goerig.)

A. Down off of Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

### Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by plaintiff's exhibits A and B on to the completion of those jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the materialmen, laborers, or otherwise on those jobs that you had terminated the exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the materialmen or the plaintiffs in this case ever knew about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

A. (Witness): No.

(Testimony of A. J. Goerig.)

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond obligation for the performance of those jobs, to be signed by Macri and Company?

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it.

Mr. Holman: May I restate the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by plaintiff's exhibits A and B required and would have to have surety bonds?

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?



(Testimony of A. J. Goerig.)

Q. A current matter at the time you signed defendant's exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

### REPORTER'S CERTIFICATE

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court

of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,  
Official Court Reporter.

[Endorsed]: Filed Aug. 4, 1947.

---

## DEPOSITION OF CLYDE PHILP

### CLYDE PHILP

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

#### Direct Examination

By Mr. Holman:

Q. Will you give your name, please?

A. Clyde Philp.

Q. You live where, Mr. Philp?

A. At 2933 Second Avenue, Seattle, Washington.

(Deposition of Clyde Philp.)

Q. Are you willing, Mr. Philp, that this deposition which is being taken may be transcribed without your reading the completed copy and without your signature thereto under the Federal Rule?

A. Yes.

Q. So you waive that, do you? A. Yes.

Q. In the record? A. Yes.

Q. What is your relationship—contractual relationship with respect to the Roza Work performed by Macri & Company involved in this action, being Bureau of Reclamation, Department of Interior, contract 12r14996, including specification No. 1068 for performance of earthwork, pipe-line, structures, laterals, sub-laterals, Roza Division, Yakima Project, Washington, according to the terms and specifications contained in said contract and particularly in accordance with specification 1068 and with respect to Bureau of Reclamation, Department of Interior Contract No. 12r-14825 for earthwork, pipe-lines and structures, laterals 5.3 and 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, with specifications No. 1062, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specification 1062. Is that question clear, Mr. Philp? A. I believe it is.

Q. All right, what is your answer?

A. Whatever contractual obligation, if any, is contained in the agreement entered into between Macri & Company and Goerig and Philp in July, 1944.

(Deposition of Clyde Philp.)

Mr. Holman: Counsel Brown, I call for the production of that.

Mr. Brown: I haven't the original of that.

Mr. Holman: All right. Maybe I can identify it.

Q. (By Mr. Holman): Is that the agreement contained in the answer and cross-complaint of the Defendants Macri as specified in the cross-complaint of the Defendants Macri as the one signed between you and them and a signed copy in your possession, Mr. Philp?

Mr. Brown: Here it is.

Mr. Holman: You have a copy?

Mr. Brown: Yes.

Mr. Holman: All right. I will have him identify it.

(Discussion off the record.)

Q. (By Mr. Holman): Your counsel has produced a copy of that agreement to which you referred? A. That's right.

Mr. Holman: Will you mark it for identification, please?

(So marked.)

Mr. Brown: That is a copy of the contract that was served and filed under order of the Court as a part of the bill of particulars.

Q. (By Mr. Holman): Mr. Philp, I hand you Defendants' and Cross-Complainants' Exhibit 1 for identification, marked in your deposition today, consisting of five typewritten pages, numbered 1 to 5,

(Deposition of Clyde Philp.)

inclusive; that is the instrument to which you refer, in view of your Counsel's stipulation, is it?

A. That's right.

Q. Now is it or is it not a fact that by reference to the contents of this identification 1, there is incorporated by reference an agreement between Sam Macri, Joe Macri and Don Macri, co-partners doing business as Sam Macri & Company, as first party, and A. J. Goerig, an individual, as second party and Clyde Philp, an individual, as third party, referring to the above contract No. 12r-14825, specification 1062, and also the additional agreement of December 11, 1943, referring to earthwork, pipelines and structures, laterals 70-1 to 80-1 and sub-lateral, East Turbine Laterals, station 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington?

A. There is mention made of those two in the agreement of July 15, 1944.

Q. And those prior agreements were executed between the parties that I have indicated, including yourself?

A. That's right.

Q. Is there any other written agreement or any other writing in any other manner affecting the two latter agreements that I have called your attention to, other than the one you have identified as Defendants' and Cross-Complainants' Exhibit 1 for identification?

A. Not to my knowledge.



(Deposition of Clyde Philp.)

Mr. Holman: I call on Counsel Brown to produce any such if they are now available.

Mr. Brown: Any such?—

Mr. Holman: Other than this.

Mr. Brown: As far as I know there is nothing else in writing.

Q. (By Mr. Holman): Then it is a fact, is it not, Mr. Philp, that the two agreements of December, 1943, to which I have directed your attention, and Defendants' identification 1, is the total written contractual relationship between you and the Defendants and Cross-Complainants Macri with respect to these jobs that I have indicated?

A. I believe that is right.

Q. What was the relationship between you and the Defendant and Cross-Complainant, A. J. Goe-rig, at the time of the execution of the instruments I have previously indicated to you in December, 1943?

A. We were partners on some jobs—

Q. I am speaking with respect to these jobs.

A. We each had an individual interest in this job.

Q. As indicated by these—

A. As indicated by the joint venture agreement signed December 11, 1943.

Q. What if any money have you, Clyde Philp, paid into the performance of the two Federal Projects I have indicated in the previous questions?

A. I would not know until there is a full accounting on the Stadium Home Project.

(Deposition of Clyde Philp.)

Q. It is a fact, is it not, that with respect to the Stadium Home Project there was an additional joint venture agreement? A. That's right.

Q. Between the same parties as I read before, that is, Macri as the first party and Goerig as the second and you the third? A. That's right.

Q. Is it a fact that except for contributions, if any, from the Stadium Home Project, there has been no contribution of cash or funds by you or by Goerig to your knowledge to the projects that I have indicated? A. That is correct.

Q. What if any equipment was furnished by you for performance of any of the work of the Roza Projects that I have indicated?

A. A 1942 G. M. C. pick-up truck.

Q. Will you indicate with respect to that, Mr. Philp, the ownership, the manner of delivery for work on this job and the time it was on the job?

A. The truck was owned by Mr. Goerig and myself. I am unable to give the exact time without referring to the records on the length of time it was on said job.

Mr. Holman: I call on Counsel to produce the record with respect to that pick-up truck.

Mr. Brown: I have no record.

Mr. Holman: I call on Counsel Brown to supplement the deposition by such a document duly verified by the party, to be filed supplementing this deposition. Could that be done, Mr. Philp?

The Witness: Well, off the record.

(Discussion off the record.)

(Deposition of Clyde Philp.)

Mr. Holman: Now I will ask Counsel Brown if he will do his best in cooperation with his client to furnish that information.

Mr. Brown: Yes, I will do that.

Q. (By Mr. Holman): Do you know the rental for that truck, Mr. Philp?

A. Not without referring to the records.

Q. Nor the time it was there?

A. Not at this time.

Q. And does that include the naked truck or the truck and driver?

A. It includes the truck only.

Q. And was that before or after OPA maximum rental regulations, do you remember?

A. It was after the OPA regulations.

Q. Can you tell me whether or not that conformed to those regulations, if you know?

A. They naturally would.

Q. You think they did, is that right?

A. I believe they did.

Q. That is the only item, Mr. Philp?

A. To the best of my knowledge.

Q. No materials furnished of any kind?

A. None that I know of.

Mr. Holman: I return the witness to you, Mr. Brown.

Mr. Brown: I have no questions.

Mr. Holman: That is all, Mr. Philp, unless you gentlemen want to ask some questions.

(Discussion off the record.)

(Deposition of Clyde Philp.)

Mr. Holman: What is the position of the Defendant Schaefer with respect to the deposition being taken; do they join with the Defendants Macri in the taking of the deposition or not?

Mr. Olson: No.

Mr. Holman: Do you wish now to take Mr. Philp's deposition?

Mr. Olson: We would be merely cross-examining. That I understand is a right we have as parties in the case.

Mr. Brown: I have no objection to cross-examination.

Mr. Holman: I haven't either. I wanted the record clear.

(Discussion off the record.)

Mr. Olson: We have no questions.

Mr. Holman: Mr. Brown, as Counsel for the Defendant and Cross-Complainant, A. J. Goerig, do you now stipulate into the record that Mr. Goerig's testimony would be the same as that as given by Mr. Philp—if Mr. Goerig were here?

Mr. Brown: Yes.

Mr. Holman: That is all.

(Witness excused.)

Mr. Holman: For the purpose of the record, Mr. Brown, I am not offering Defendants' Identification 1. I don't know whether you want to offer it or not.

Mr. Brown: Yes, I will offer it and will have it attached to the deposition.

Mr. Holman: There is no objection on the part of the Defendants Macri.

(Agreement terminating joint venture offered in evidence as Defendant and Cross-Complainant's Exhibit 1, the same being attached hereto and returned herewith.)

Filed Feb. 24, 1947.

---

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on regularly for trial in open court, the beneficial plaintiff having appeared through its attorney, Howard W. Hedgcock; and the defendants, Sam Macri, Joe Macri and Don Macri, appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar; and defendants, Clyde Philp and A. J. Goerig, appearing by and through their attorneys, Brown & Hawkins; and the defendant, Continental Casualty Company, appearing by and through its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann; and the court hearing evidence and being fully advised in the premises, does now make the following findings of fact and conclusions of law:

### Findings of Fact

#### I.

That the above action was brought under the Act of Congress of August 24, 1935, being Sections



270-a, 270-b, 270-d, Title 40 of the United States Code Annotated, commonly known as the Miller Act, and was brought in the name of the United States of America for the use of the plaintiff named in the caption hereof against the defendants herein for and on account of the matters hereinafter set forth.

## II.

H. H. Walker, Inc., the beneficial plaintiff, is a California corporation, duly organized and existing, and is authorized to do business in the State of Washington and has paid all of its license fees due so as to entitle it to transact its business within the State of Washington.

## III.

That all times herein mentioned the defendants, Sam Macri, Joe Macri and Don Macri, were co-partners doing business as Macri & Company. That the defendants, Clyde Philp and A. J. Goerig, had been previously associated with said named Macris under a joint venture agreement; that all of the last named defendants were and now are citizens of the State of Washington.

## IV.

That the Continental Casualty Company is a corporation duly organized, existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business at Hammond, Indiana, and is engaged generally in the

business of writing surety bonds and becoming surety on such bonds written for any party who pays unto it the regular required premium therefor, and is duly licensed and authorized to and is transacting such business in the State of Washington and has been at all times herein mentioned.

## V.

That the defendant, Sam Macri, for and on behalf of himself and for and on behalf of the aforesaid co-partners and joint adventurers, entered into a contract with the United States of America, through the United States Bureau of Reclamation for the completion of certain work known as Roza Division, Yakima Project, Specification No. 1068, in the vicinity of Prosser, located in Benton County, Washington. That said contract is a public record on file with the General Accounting Office of the United States and is known and designated by said number above specified.

## VI.

Pursuant to the Act of Congress as aforesaid, and the Statutes applicable hereto, the defendant, Sam Macri and the other co-partners and joint adventurers heretofore referred to, furnished and executed to the United States a payment bond pertaining to the operations of said Sam Macri and the partnership known and designated as Macri & Company in the performance of said contract, and the defendant, Continental Casualty Company, a corporation, became surety for said Sam

Macri and the partnership known and designated as Macri & Company, thereon; that said bond is a public record in the General Accounting Office of the United States and it was conditioned for the protection and payment of all persons supplying labor and material to said principal contractors in the prosecution of the work provided for in said contract, all in accordance with the Laws of the United States and the Statutes thereof as hereinbefore referred to. That a copy thereof, duly certified, has been admitted in evidence. That said bond was in the sum of \$84,833.75.

## VII.

That thereafter, or about March, 1945, the said defendants, Sam Macri, and the co-partnership designated as Macri & Company, entered into a rental agreement with the beneficial plaintiff, H. H. Walker, Inc., to furnish certain equipment which was necessary to complete the work under the aforesaid contract and that said equipment which was rented was used by the defendants to complete the aforesaid contract.

## VIII.

That in accordance with the terms of said rental agreement and upon the direction of the defendants Macri, the beneficial plaintiff did furnish the use of said equipment of the reasonable and agreed value of \$3,842.83, and that the beneficial plaintiff's claim in said amount constituted a lien against the

proceeds represented by the penalty of the bond to the extent of said sum of \$3,842.83.

### IX.

That more than ninety days elapsed from the last date of the furnishing of said equipment by the beneficial plaintiff at the request of the defendants Macri, which was necessary to complete the work under the aforesaid contract, and that less than one year elapsed from the date of the complete performance and final settlement of the contract herein which was on October 15, 1945 and the date of the institution of this suit.

### X.

That the ground upon which the jurisdiction of this court is invoked is that the action arises out of the Act of Congress referred to above which expressly directs the bringing of said action in this court, to wit, the United States District Court, Eastern District of Washington, Southern Division, being the district in which said contract was to be performed and completed.

### XI.

That the beneficial plaintiff made demand upon Macri & Company for the payment of the unpaid balance of \$3,842.83 but that said defendants Macri have failed, neglected and refused to pay said sum or any part thereof.

## XII.

That the beneficial plaintiff is not entitled to any interest upon said sum of \$3,842.83.

## XIII.

That in connection with the issuance of the payment bond by defendant, Continental Casualty Company above referred to, and as a part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers, to wit, Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to the Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to wit:

“2. To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds, or any of them; prosecuting or defending any action brought in connection therewith in obtaining release therefrom and in enforcing any agreements herein contained.”

## XXIV.

That the relationship of joint adventurers or co-partners existing between the defendants Joe Macri,



Sam Macri and Don Macri, as first parties, and Clyde Philip and A. J. Goerig, as other parties, was terminated prior to the incurring of the liability of the beneficial plaintiff herein.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

The court having heretofore made and entered its findings of fact, does now make the following

### Conclusions of Law

#### I.

That the beneficial plaintiff, H. H. Walker, Inc., a California corporation, is entitled to judgment in the amount of \$3,842.83, the said amount to be without interest, together with its costs and disbursements herein incurred, against the defendants, Sam Macri, Joe Macri and Don Macri, co-partners, doing business as Macri & Company, and Continental Casualty Company, an Indiana corporation.

#### II.

That the Continental Casualty Company, an Indiana corporation, is entitled to judgment on its cross-complaint against the defendants, Sam Macri, Joe Macri, Don Macri, co-partners, Clyde Philip and A. J. Goerig, as joint adventurers, doing business as Macri & Company, in the amount of \$3,842.83, together with a reasonable attorney's fee in the amount of \$175.00.

## III.

That the defendants, A. J. Goerig and Clyde Philp, are entitled to a judgment of dismissal against the defendants, Sam Macri, Joe Macri and Don Macri, on the latter's cross-complaint against A. J. Goerig and Clyde Philp.

## IV.

That the defendants, Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants, A. J. Goerig and Clyde Philp, on the latter's cross-complaint against the Macris.

## V.

That the defendants, A. J. Goerig and Clyde Philp, are entitled to a judgment of dismissal against the beneficial plaintiff, H. H. Walker, Inc., on its complaint against them.

Done In Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ HOWARD W. HEDGCOCK.

Filed May 1, 1947.

In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division

Civil Action No. 250

UNITED STATES OF AMERICA for the use  
and benefit of H. H. WALKER, INC., a  
corporation,

Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY, a  
corporation, SAM MACRI, JOE MACRI and  
DON MACRI, A. J. GOERIG and CLYDE  
PHILP, doing business under the name and  
style of MACRI & COMPANY,

Defendants.

### JUDGMENT

The above matter coming on for hearing in open court, the beneficial plaintiff, H. H. Walker, Inc., appearing by and through its attorney, Howard W. Hedgecock; the defendants, Sam Macri, Joe Macri and Don Macri, appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar; the defendants, Clyde Philp and A. J. Goerig, appearing by and through their attorneys, Brown & Hawkins; and the defendant, Continental Casualty Company, appearing by and through its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann; and the court having heard evidence and being fully advised in the premises, and having heretofore

entered its findings of fact and conclusions of law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the beneficial plaintiff, H. H. Walker, Inc., a California corporation, be and it is hereby granted judgment in the sum of \$3,842.83, without interest upon said amount, together with its costs and disbursements herein incurred, in the amount of \$29.34 against the defendants, Sam Macri, Joe Macri and Don Macri, co-partners doing business as Macri & Company, and against the Continental Casualty Company, an Indiana Corporation.

It Is Further Ordered, Adjudged and Decreed:

That the Continental Casualty Company, an Indiana corporation, is granted judgment against the defendants, Sam Macri, Joe Macri, Don Macri and Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company, in the amount of \$3,842.83, without interest, together with a reasonable attorney's fee in the sum of \$175.00 together with costs in the amount of \$. . . . . none.

It Is Further Ordered, Adjudged and Decreed:

That A. J. Goerig and Clyde Philp are granted a judgment of dismissal as against the defendants, Sam Macri, Joe Macri and Don Macri, on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed:

That the defendants, Sam Macri, Joe Macri and

Don Macri, are granted a judgment of dismissal against the defendants, A. J. Goerig and Clyde Philp on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed:

That the defendants, A. J. Goerig and Clyde Philp, are granted a judgment of dismissal against the beneficial plaintiff, H. H. Walker, Inc., a California corporation, on its complaint against them without costs.

Done In Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ HOWARD W. HEDGCOCK.

Filed May 1, 1947.

---

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the ground and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the



- court or abuse of discretion by which the losing party was prevented from having a fair trial;
2. Misconduct of the prevailing party, his attorney or the jury;
  3. Accident or surprise which ordinary prudence could not have guarded against;
  4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.
  5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
  6. Insufficiency of the evidence to justify the verdict or decision;
  7. Error in law occurring at the trial;
  8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants,

A. J. Goerig and

Clyde Philp.

Filed May 12, 1947.

---

[Title of District Court and Cause.]

ORDER DENYING MOTION  
FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the ground for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is Now, Therefore,

Ordered, Adjudged and Decreed that the motion

for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp except and their exception is allowed.

Done In Open Court this 20th day of May, 1947.

SAM M. DRIVER,

Judge.

Presented By

WILLARD E. SKEEL.

Filed May 20, 1947.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

KENNETH C. HAWKINS,

NAT. U. BROWN.

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Copies mailed to: Murray & Hedgecock, 306 Central Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17 Floor Hoge Bldg., Seattle, Wash.; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,  
Clerk.

By MARIE EALY,  
Deputy.

Filed July 29, 1947.

---

[Title of District Court and Cause.]

APPELLANTS A. J. GOERIG AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I.

The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. The materials or labor furnished by the use plaintiff were furnished with respect to specification 1068 and the obligation which the bonding company was obligated to pay was therefore with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of

Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compensate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.
3. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.
4. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "Partners."
5. The "silent" partnership was terminated prior to affixing of liability of the bond.
6. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.
7. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

## II.

The United States District Court was in error



in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS.

NAT. U. BROWN,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Filed July 30, 1947.

---

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, A. J. Goerig and Clyde Philp, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto Sam Maeri, Don Maeri and Joe Maeri, d/b/a Maeri & Company and the Continental Casualty Company and the H. H. Walker, Inc., a Corporation in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That, Whereas, the above named Plaintiff, H. H. Walker, Inc., a Corporation, on the 1st day of May,

1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., and Continental Casualty Company, above named for Judgment against Macri, et al., for costs in the amount of \$29.34. Judgment against Macri, et al., in the amount of \$3,842.83 (without Interest), and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said sums plus attys fee of \$175.00.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay H. H. Walker, Inc., a Corporation, Sam Macri, Joe Macri and Don Macri, and the Continental Casualty Company, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,  
CLYDE PHILP,

[Seal] MANUFACTURERS CASUALTY  
INSURANCE COMPANY,

By A. A. NAEF,  
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFromboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages numbered 1 to 55, inclusive, is a full, true and correct copy of so much of the record papers and proceedings, in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office and that the same constitutes the record on appeal of said Appellants from the Judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in the transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants.

I further certify that the “memorandum decision of the Honorable Sam M. Driver, dated March 27, 1947” as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in the record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record as called for in the designation of record on appeal of the Appellants amount to \$9.50, and the same has been paid in full by Brown and Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

## PLAINTIFF'S EXHIBIT A

General Accounting Office

Contract No. 12r-14825

(Construction)

(Department): Department of the Interior.

(Contractor): Macri Company.

Contract for earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals.

Place: Roza Division, Yakima project, Washington.

Amount, \$128,550.95.

\* \* \* \* \*

Contract for Construction

This Contract, entered into this 7th day of De-

cember, 1943, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Macri Company, a partnership consisting of Sam Macri, Don Macri and Joe Macri, of the city of Seattle, in the State of Washington, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

\* \* \* \* \*

In Witness Whereof, the parties hereunto have executed this contract as of the day and year first above written.

Dec. 29, 1943.

UNITED STATES OF AMERICA,

By WARREN R. YOUNG,

Acting Chief Engineer,

Bureau of Reclamation.

MACRI COMPANY,

Contractor.

By SAM MACRI,

Member of firm

905 Tenth Avenue South,

Seattle 4, Washington.

Two witnesses:

/s/ DONA JAMISON.

/s/ NIELS H. HJORTH.

\* \* \* \* \*



## Payment Bond (Construction)

Pursuant to the Act of Congress,

Approved August 24, 1935. 49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, (See Instructions 4, 5 and 7) as Principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, as Surety, (See Instructions 2, 3, 4 and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty four thousand two hundred seventy five and 48/100 (\$64,275.48) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized

modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its under-signed representative, pursuant to authority of its governing body.

[Seal]     /s/ SAM MACRI

Individual principal

905 Tenth Avenue South,  
Seattle 4, Washington

[Seal]     /s/ DON MACRI

Individual principal

905 Tenth Avenue South,  
Seattle 4, Washington

[Seal]     /s/ JOE MACRI

Individual principal

905 Tenth Avenue South,  
Seattle 4, Washington

In presence of

/s/ NIELS H. HJORTH

3739 Burns St.  
Seattle, Wn.

[Stamp] Jan 13, 1944. Treasury Department,  
Bureau of Accounts. 973237.

CONTINENTAL CASUALTY  
COMPANY

Corporate surety

Box 586,

Yakima, Washington

[Affix corporate seal]

By /s/ CLYDE E. PHILP

Attorney-in-fact.

Attest:

/s/ ELLA HOLT.

---

PLAINTIFF'S EXHIBIT B

General Accounting Office

Contract No. 12r-14996

(Construction)

Jul 14 1944

Reviewed MCM 8/16/44.

(Department): Department of the Interior.

(Contractor): Macri Company.

Contract for earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45.

Place: Roza Division, Yakima Project, Washington.

Amount, \$169,667.50.

Contract for Construction

This Contract, entered into this 18th day of May, 1944, by the United States of America, hereinafter called the Government, represented by the Contracting officer executing this contract, and Macri Company, a partnership consisting of Sam Macri, Don Macri and Joe Macri, of the city of Seattle, in the State of Washington, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

\* \* \* \* \*

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

June 21, 1944.

UNITED STATES OF AMERICA,

By S. O. HARPER,

Chief Engineer,

Bureau of Reclamation.

MACRI COMPANY,

Contractor.

By SAM MACRI,

Member of firm

905 Tenth Avenue South,  
Seattle 4, Washington.

Two witnesses:

PAUL D. LANEY.

DORIS SUTHERLAND.

\* \* \* \* \*

Payment Bond (Construction) Bond # 904317

Pursuant to the Act of Congress,  
Approved August 24, 1935. 49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, (See Instructions 4, 5 and 7) as Principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, as Surety, (See Instructions 2, 3, 4 and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of eighty four thousand eight hundred thirty three and 75/100 (\$84,833.75) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is such, that whereas the principal entered into a certain contract hereto attached, with the Government, dated May 18, 1944, for earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided



for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 18th day of May, 1944, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its under-signed representative, pursuant to authority of its governing body.

[Seal]      /s/ SAM MACRI

Individual principal

905 Tenth Ave. South,  
Seattle, Washington

[Seal]      /s/ DON MACRI

Individual principal

905 Tenth Ave. South,  
Seattle, Washington

[Seal]      /s/ JOE MACRI

Individual principal

905 Tenth Ave. South,  
Seattle, Washington

In presence of

B. W. BURTCHE

5103 Latona,  
Seattle, Wn.

Jun 30 1944 Treasury Department, Bureau of  
Accounts, Section of Surety Bonds.

Examined and recorded.

The within corporate surety is duly certified and evidence of the authority of the officers or agents signing on its behalf is on file in this office.

E. F. BARTELL

Commissioner

CONTINENTAL CASUALTY  
COMPANY

Corporate Surety

P. O. Box 586,  
Yakima, Washington

[Affix Corporate Seal]

By L. G. GREWE

Attorney-in-Fact.

Attest:

E. M. BARD

The rate of premium on this bond is 1% of the contract price per thousand.

Total amount of premium charged, \$ included in performance bond premium. (The above must be filled in by corporate surety).

## DEFENDANT CASUALTY CO. EXHIBIT No. 1

Application for Contract or Bid Bond Made to  
Continental Casualty Company. General Of-  
fice: Chicago

Note—Copy of Contract, Specifications, Plans, Bond Form required (in case Bid Bond, Advertisement and Instructions to bidders), and Applicant's Financial Statement must accompany this Application and all questions be fully answered.

Note—If the required information is not given in response to the questions hereon listed, it will be necessary to return this blank for completion.

General Office Bond No.....

Agent's Bond No.....

Agent's Name: Clyde Philp.

Agent's Address:.....

Amount of Bond: \$64,275.48.

Amount of Premium: \$ Included in Perf. bond.

Period of Bond: 12/7/43.

1. Full name of Applicant: Macri Company.
2. Business address: 905 10th Ave. So., Seattle, Washington.
3. If Applicant is a firm, name all partners of firm; if a corporation, name principal officers and directors.

Name..... Age..... Address.....

4. If Applicant is a corporation, state when incorporated.....In what state incorporated.....

Deft. Casualty Co. Exhibit No. 1—(Continued)

5. Kinds and amounts of bonds required; Proposal Bond, \$.....; Contract Bond, \$64,-275.48. Labor and Material Bond, \$.....; Maintenance Bond, \$.....
6. To whom is bond to be given? U. S. A.-Department of Interior, Bureau of Reclamation. Address: Customhouse, Denver, Colorado.
7. If bond applied for is Proposal Bond, will it operate as a final bond?..... Stated date bids to be opened....., 19.... Approximate amount of bid, \$..... What bids for other contracts have you outstanding?.....
8. The Amount of Contract is: \$128,550.95. Date awarded December 7, 1943.
9. Nature of Contract (Give concise description of proposed work and locality) construction of earthwork, pipe lines & structures, laterals 59.3 to 69.8 and sublaterals under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.
10. Name and address of Architect or Engineer in charge..... What is his estimate of cost of work? \$..... Your estimate? \$.....
11. Other Bidders on above contract including highest and lowest:

Name	Address	Bid
1.....	.....	.....
2.....	.....	.....
3.....	.....	.....
4.....	.....	.....
5.....	.....	.....

## Deft. Casualty Co. Exhibit No. 1—(Continued)

If more than five bids, tabulate them on separate paper and attach to above.

Agents must verify bids through consultation with Architect or Engineer and transmit with this application an Official Tabulation of Bids.

## Terms of Contract

12. Date work is to be commenced.....Date work is to be completed.....
13. Penalty for non-completion on time.....Premium for advance completion?.....
14. Is there a strike clause in the contract?.....  
An arbitration provision?.....
15. Payments, when to be made on contract?.....
16. Are payments to be made wholly in cash?.....  
If not, in what?.....If payments are in stocks, bonds, warrants or other securities, advise fully what arrangements made for disposing of same.....
17. Percentage reserved from payments until completion.....
18. How long must work be kept in Repair after completion?.....Is this Repair or Maintenance guarantee limited to defects in workmanship or materials?.....If not, describe guarantee fully.....



Deft. Casualty Co. Exhibit No. 1—(Continued)

19. Will construction bond remain in force for the maintenance repair or guarantee period?.....  
If not, will separate bond be required?.....  
and in what amount? \$.....
20. What portion of work is guaranteed after completion and value of same?.....Percentage of payments retained until expiration of maintenance period?.....
21. State approximate amount of this contract which will be Sublet \$....., and describe below the principal Sub-Contracts:

Amount	Character of Work	Name of Sub-Contractor	Address
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

22. Will you require sub-contractors to give bonds?  
.....Corporate or Private?.....
23. Have you purchased or made binding contracts for the materials needed for this contract, and within your estimates?.....
24. How are deliveries assured to you?.....
25. Give information below about all your Contract Work Under Way, or for which you are committed.

Deft. Casualty Co. Exhibit No. 1—(Continued)

Contract Price	Kind of Construction	Location of Work	Payments Thus Far Received	Earned Retained Percentage	Expected Completion Date	Name and Address Engineer or Architect
a.....	.....	.....	.....	.....	.....	.....
b.....	.....	.....	.....	.....	.....	.....
c.....	.....	.....	.....	.....	.....	.....
d.....	.....	.....	.....	.....	.....	.....
e.....	.....	.....	.....	.....	.....	.....

26. Names of surety companies which issued bonds on above (a)..... (b)..... (c).....  
(d)..... (e).....

27. Have you applied to any other company for this Bond?..... State name of company and reasons why declined.....

28. Give names of surety companies with which you have previously dealt.....

29. State amount and character of Insurance you will carry on this contract and name of company issuing each policy. Fire (Amount) \$.....; (Company).....; Compensation, (Amount) \$.....; (Company).....; Employers' Liability, (Amount) \$.....; (Company).....; Public Liability, (Amount) \$.....; (Company).....; Contingent Liability, (Amount) \$.....; (Company).....

Deft. Casualty Co. Exhibit No. 1—(Continued)

## Experience

30. How many years have you been in business under your present name?.....
31. What projects have you completed in your own name.
- Contract Amount .....
- Class of Work.....
- When Completed .....
- Name and Address of Owner.....
32. Have you ever failed to complete any work awarded to you?.....If so, where and why?.....
33. Has any officer or partner of your organization ever failed to complete a construction contract handled in his own name?.....If so, state name of individual, name of owner, and reason therefor.....
34. Has any officer or partner of your organization ever been an officer or partner of some other organization that failed to complete a construction contract?.....If so, state name of individual, other organization, name of owner and reason therefor.....
35. What is the construction experience of the principal individuals of your organization?
- Individual's Name .....
- Present Position or Office.....
- Years of Construction Experience.....
- Magnitude and Type of Work.....
- In What Capacity.....

Deft. Casualty Co. Exhibit No. 1—(Continued)

## General

36. Is your present plant sufficient for this contract?.....Estimated cost to put it in good shape for this work, \$..... State what new plant will be purchased, advising cost and how you will pay for same (Use separate sheet if necessary).....
37. With what bank have you arranged a loan for the purpose of handling this contract?.....
38. What is the amount of such loan? \$.....
39. What security, if any, has the bank required for the loan? \$.....
40. When and how must you repay the loan?.....
41. Have you assigned or will you assign to other than your surety your payments on this or any other contract or any part thereof?.....
42. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract?.....
43. Are there any mechanics' liens filed on any of your work anywhere?.....
44. Are there any judgments, suits or claims pending against you?.....
45. Are you interested in more than one line of business?..... If so, give particulars.....
46. References: Give only Engineers or Architects, or Owners, for whom you have done work:  
Name..... Address..... Business.....

The undersigned does or do hereby represent that the statements made herein as an inducement to

Deft. Casualty Co. Exhibit No. 1—(Continued)  
the Continental Casualty Company (hereinafter called Company) to execute or procure the bond or bonds herein applied for, are true, and should the Company execute or procure said bond or bonds, does or do hereby agree, for the undersigned, the heirs, personal representatives and assigns of the undersigned, jointly and severally, as follows: First, to pay to the Company, in advance, the following premiums: the premium of.....Dollars (\$.....) for the proposal bond, for its term, or any part thereof; the premium of.....Dollars (\$.....) for the full maintenance or guarantee period, or any part thereof; the premium of included in performance bond premium Dollars (\$.....) for the contract bond and the labor and material bond, if any (the premium for said contract bond and labor and material bond, if any, being at the rate of 1 per cent of the original contract price), for the term of (Insert "one year" on Class "A" and "two years" on Class "B" contracts).....year..., beginning on the date of said contract bond, or for any part of said term; and an annual premium in advance for each year after said term at the rate of.....of one per cent of said contract price, and an additional term and annual premium at said rates, based on any increase of said contract price, as shown by the certificate of the engineer or architect in charge, and to be adjusted upon completion of said contract, such annual premiums to be paid as long as liability on said contract bond shall continue after said term and until the undersigned



Deft. Casualty Co. Exhibit No. 1—(Continued) shall deliver to the Company, at its Home Office in Chicago, written evidence, satisfactory to the Company, of its discharge from such liability; Second, to indemnify the Company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained; Third, that the Company shall have the right, and is hereby authorized but not required: (a) In the event of any abandonment or forfeiture of the contract guaranteed by said contract bond or of any breach of said contract bond, to take possession of the work under said contract, and at the expense of the undersigned to complete, or to contract for the completion of, the same, or to consent to the reletting or completion thereof by the Obligee in said contract bond: (b) To adjust, settle or compromise any claim, demand, suit of judgment upon said bond or bonds, or any of them, unless the undersigned shall request the Company to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Company, at the time of such request, cash or collateral satisfactory to it in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with

Deft. Casualty Co. Exhibit No. 1—(Continued)  
interest, costs and attorney's fees; (c) To fill up any blanks left herein, and to correct any errors in the description of said bond or bonds, or any of them, or in said premium or premiums, it being hereby agreed that such insertions or corrections, when so made, shall be prima facie correct; Fourth, to assign, transfer, and set over, and does or do hereby assign, transfer, and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (5) of any proceeding which deprives the undersigned of the use of any of the machinery, equipment, plant, tools or material referred to in the following paragraph; or (6) of the undersigned's dying, absconding, becoming a fugitive from justice, or being convicted of a felony, if the undersigned be an individual:

Deft. Casualty Co. Exhibit No. 1—(Continued)

(a) All the right, title and interest of the undersigned in and to all sub-contracts let or to be let in connection with said contract and in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be, about or upon the site of said work or elsewhere, for the purpose thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; (c) All actions, causes of actions, claims and demands whatsoever which the undersigned may have or acquire against any sub-contractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with or on account of said contract; (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; Fifth, that liability hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits and judgments upon said bond or bonds, or any

Deft. Casualty Co. Exhibit No. 1—(Continued)  
of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorney's fees, as aforesaid, which may be made under the belief that such were necessary, whether necessary or not; Sixth, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses, and attorney's fees, claims, demands, suits, and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and the Company; Seventh, to waive, and does or do hereby waive, all rights to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; Eighth, that this obligation shall, in all its terms and agreements, for the benefit of and protect any person or company joining with the Company in executing said bond or bonds, or any of them, or executing, at the request of the Company, said bond or bonds, or any of them, as well as any company or companies assuming reinsurance thereupon; Ninth, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment

Deft. Casualty Co. Exhibit No. 1—(Continued)  
upon any cause of action shall not prejudice or  
bar the bringing of other suits upon other causes  
of action, whether theretofore or thereafter arising;  
Tenth, that nothing herein contained shall be con-  
sidered or construed to waive, abridge, or diminish  
any right or remedy while the Company might have  
if this instrument were not executed; Eleventh,  
that the Company shall have the right to decline  
to execute said bond or bonds, or any of them, and  
if it shall execute said proposal bond shall have  
the right to decline to execute any or all of the  
other bonds herein applied for.

Signed, sealed and dated this <sup>7th</sup>~~18th~~ day of <sup>December,</sup>~~May,~~  
1944. <sup>1943</sup>

[Seal]

MACRI &amp; CO.

By /s/ SAM MACRI



## DEFENDANT CASUALTY CO. EXHIBIT No. 2

Application for Contract or Bid Bond Made to  
Continental Casualty Company. General Of-  
fice: Chicago

Note—Copy of Contract, Specifications, Plans, Bond Form required (in case Bid Bond, Advertisement and Instructions to bidders), and Applicant's Financial Statement must accompany this Application and all questions be fully answered.

Note—If the required information is not given in response to the questions hereon listed, it will be necessary to return this blank for completion.

General Office Bond No. 904317.

Agent's Bond No.....

Agent's Name: Jerome Lewis & Co.

Agent's Address: Yakima, Washington.

Amount of Bond: \$84,833.75.

Amount of Premium: \$ included in perf. bond premium.

Period of Bond: 5/18/44.

1. Full name of Applicant: Sam Macri, Don Macri and Joe Macri, partners composing the firm Macri Company.
2. Business address: Seattle, Washington.
3. If Applicant is a firm, name all partners of firm; if a corporation, name principal officers and directors.

Name..... Age..... Address.....

## Deft. Casualty Co. Exhibit No. 2—(Continued)

4. If Applicant is a corporation, state when incorporated.....In what state incorporated.....
5. Kinds and amounts of bonds required; Proposal Bond, \$.....; Contract Bond, \$..... Labor and Material Bond, \$.....; Maintenance Bond, \$.....
6. To whom is bond to be given? U.S.A. Address.....
7. If bond applied for is Proposal Bond, will it operate as final bond?.....Stated date bids to be opened....., 19.... Approximate amount of bid, \$..... What bids for other contracts have you outstanding?.....
8. The Amount of Contract is: \$169,667.50. Date awarded May 18, 1944.
9. Nature of Contract (Give concise description of proposed work and locality) for earthwork, pipe lines, and structures, laterals 70+1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima project, Washington.
10. Name and address of Architect or Engineer in charge..... What is his estimate of cost of work? \$..... Your estimate? \$.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

11. Other Bidders on above contract including highest and lowest:

Name	Address	Bid
1.....		
2.....		
3.....		
4.....		
5.....		

If more than five bids, tabulate them on separate paper and attach to above.

Agents must verify bids through consultation with Architect or Engineer and transmit with this application an Official Tabulation of Bids.

### Terms of Contract

12. Date work is to be commenced.....Date work is to be completed.....
13. Penalty for non-completion on time.....Premium for advance completion?.....
14. Is there a strike clause in the contract?.....  
An arbitration provision?.....
15. Payments, when to be made on contract?.....
16. Are payments to be made wholly in cash?.....  
If not, in what?.....If payments are in stocks, bonds, warrants or other securities, advise fully what arrangements made for disposing of same.....
17. Percentage reserved from payments until completion.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

18. How long must work be kept in Repair after completion?.....Is this Repair or Maintenance guarantee limited to defects in workmanship or materials?.....If not, describe guarantee fully.....
19. Will construction bond remain in force for the maintenance repair or guarantee period?.....If not, will separate bond be required?.....and in what amount? \$.....
20. What portion of work is guaranteed after completion and value of same?.....Percentage of payments retained until expiration of maintenance period?.....
21. State approximate amount of this contract which will be Sublet \$....., and describe below the principal Sub-Contracts:

Amount	Character of Work	Name of Sub-Contractor	Address
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

22. Will you require sub-contractors to give bonds? .....Corporate or Private?.....
23. Have you purchased or made binding contracts for the materials needed for this contract, and within your estimates?.....
24. How are deliveries assured to you?.....
25. Give information below about all your Contract Work Under Way, or for which you are committed.

## Deft. Casualty Co. Exhibit No. 2—(Continued)

Contract Price	Kind of Construction	Location of Work	Payments Thus Far Received	Earned Retained Percentage	Expected Completion Date	Name and Address Engineer or Architect
a.....	.....	.....	.....	.....	.....	.....
b.....	.....	.....	.....	.....	.....	.....
c.....	.....	.....	.....	.....	.....	.....
d.....	.....	.....	.....	.....	.....	.....
e.....	.....	.....	.....	.....	.....	.....

26. Names of surety companies which issued bonds on above (a)..... (b)..... (c)..... (d)..... (e).....

27. Have you applied to any other company for this Bond?..... State name of company and reasons why declined.....

28. Give names of surety companies with which you have previously dealt.....

29. State amount and character of Insurance you will carry on this contract and name of company issuing each policy. Fire (Amount) \$.....; (Company).....; Compensation, (Amount) \$.....; (Company).....; Employers' Liability, (Amount) \$.....; (Company).....; Public Liability, (Amount) \$.....; (Company).....; Contingent Liability, (Amount) \$.....; (Company).....



## Deft. Casualty Co. Exhibit No. 2—(Continued)

## Experience

30. How many years have you been in business under your present name?.....
31. What projects have you completed in your own name?
- Contract Amount .....
- Class of Work.....
- When Completed .....
- Name and Address of Owner.....
32. Have you ever failed to complete any work awarded to you?.....If so, where and why?.....
33. Has any officer or partner of your organization ever failed to complete a construction contract handled in his own name?.....If so, state name of individual, name of owner, and reason therefor.....
34. Has any officer or partner of your organization ever been an officer or partner of some other organization that failed to complete a construction contract?.....If so, state name of individual, other organization, name of owner and reason therefor.....
35. What is the construction experience of the principal individuals of your organization?
- Individual's Name .....
- Present Position or Office.....
- Years of Construction Experience.....
- Magnitude and Type of Work.....
- In What Capacity.....

## Deft. Casualty Co. Exhibit No. 2—(Continued)

## General

36. Is your present plant sufficient for this contract?.....Estimated cost to put it in good shape for this work, \$..... State what new plant will be purchased, advising cost and how you will pay for same (Use separate sheet if necessary).....
37. With what bank have you arranged a loan for the purpose of handling this contract?.....
38. What is the amount of such loan? \$.....
39. What security, if any, has the bank required for the loan? \$.....
40. When and how must you repay the loan?.....
41. Have you assigned or will you assign to other than your surety your payments on this or any other contract or any part thereof?.....
42. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract?.....
43. Are there any mechanics' liens filed on any of your work anywhere?.....
44. Are there any judgments, suits or claims pending against you?.....
45. Are you interested in more than one line of business?..... If so, give particulars.....
46. References: Give only Engineers or Architects, or Owners, for whom you have done work:  
Name..... Address..... Business.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

The undersigned does or do hereby represent that the statements made herein as an inducement to the Continental Casualty Company (hereinafter called Company) to execute or procure the bond or bonds herein applied for, are true, and should the Company execute or procure said bond or bonds, does or do hereby agree, for the undersigned, the heirs, personal representatives and assigns of the undersigned, jointly and severally, as follows: First, to pay to the Company, in advance, the following premiums: the premium of.....Dollars (\$.....) for the proposal bond, for its term, or any part thereof; the premium of.....Dollars (\$.....) for the full maintenance or guarantee period, or any part thereof; the premium of included in performance bond premium Dollars (\$.....) for the contract bond and the labor and material bond, if any (the premium for said contract bond and labor and material bond, if any, being at the rate of..... per cent of the original contract price), for the term of (Insert "one year" on Class "A" and "two years" on Class "B" contracts).....year...., beginning on the date of said contract bond, or for any part of said term; and an annual premium in advance for each year after said term at the rate of.....of one per cent of said contract price, and an additional term and annual premium at said rates, based on any increase of said contract price, as shown by the certificate of the engineer or architect in charge, and to be adjusted upon completion of said contract, such annual premiums to be paid

Deft. Casualty Co. Exhibit No. 2—(Continued)  
as long as liability on said contract bond shall continue after said term and until the undersigned shall deliver to the Company, at its Home Office in Chicago, written evidence, satisfactory to the Company, of its discharge from such liability; Second, to indemnify the Company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained; Third, that the Company shall have the right, and is hereby authorized but not required: (a) In the event of any abandonment or forfeiture of the contract guaranteed by said contract bond or of any breach of said contract bond, to take possession of the work under said contract, and at the expense of the undersigned to complete, or to contract for the completion of, the same, or to consent to the reletting or completion thereof by the Obligee in said contract bond; (b) To adjust, settle or compromise any claim, demand, suit of judgment upon said bond or bonds, or any of them, unless the undersigned shall request the Company to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Company, at the time of such request, cash or collateral satisfactory to it in kind

Deft. Casualty Co. Exhibit No. 2—(Continued)  
and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs and attorney's fees; (c) To fill up any blanks left herein, and to correct any errors in the description of said bond or bonds, or any of them, or in said premium or premiums, it being hereby agreed that such insertions or corrections, when so made, shall be prima facie correct; Fourth, to assign, transfer, and set over, and does or do hereby assign, transfer, and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (5) of any proceeding which deprives the undersigned of the use of any of the machinery, equipment, plant, tools or material referred to in the following paragraph; or (6) of the undersigned's dying, absconding, be-



Deft. Casualty Co. Exhibit No. 2—(Continued)  
coming a fugitive from justice, or being convicted of a felony, if the undersigned be an individual:  
(a) All the right, title and interest of the undersigned in and to all sub-contracts let or to be let in connection with said contract and in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be, about or upon the site of said work or elsewhere, for the purpose thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; (c) All actions, causes of actions, claims and demands whatsoever which the undersigned may have or acquire against any sub-contractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with or on account of said contract; (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; Fifth, that liability hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits

Deft. Casualty Co. Exhibit No. 2—(Continued)  
and judgments upon said bond or bonds, or any of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorney's fees, as aforesaid, which may be made under the belief that such were necessary, whether necessary or not; Sixth, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses, and attorney's fees, claims, demands, suits, and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and the Company; Seventh, to waive, and does or do hereby waive, all rights to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; Eighth, that this obligation shall, in all its terms and agreements, for the benefit of and protect any person or company joining with the Company in executing said bond or bonds, or any of them, or executing, at the request of the Company, said bond or bonds, or any of them, as well as any company or companies assuming reinsurance thereupon; Ninth, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or

Deft. Casualty Co. Exhibit No. 2—(Continued)  
 bar the bringing of other suits upon other causes  
 of action, whether theretofore or thereafter arising;  
 Tenth, that nothing herein contained shall be con-  
 sidered or construed to waive, abridge, or diminish  
 any right or remedy while the Company might have  
 if this instrument were not executed; Eleventh,  
 that the Company shall have the right to decline  
 to execute said bond or bonds, or any of them, and  
 if it shall execute said proposal bond shall have  
 the right to decline to execute any or all of the  
 other bonds herein applied for.

Signed, sealed and dated this <sup>18th</sup> day of <sup>May</sup> ~~Decem-~~  
~~ber, 1943.~~ 1944,

[Seal]

MACRI COMPANY

/s/ JOE MACRI

---

## DEFENDANTS' MACRI EXHIBIT No. 1

### Joint Venture Agreement

# 267

This Joint Venture Agreement, Made and entered  
 into as of this date December 11, 1943, by and  
 between Sam Macri, Joe Macri and Don Macri,  
 copartners doing business as Macri & Company of  
 Seattle, Washington herein referred to as First  
 Party, and A. J. Goerig, an individual herein re-  
 ferred to as Second Party, and Clyde Philp, an  
 individual herein referred to as Third Party, and  
 ..... herein referred as Third Party, and.....  
 herein referred to as Fourth Party.

Defendants' Macri Exhibit No. 1—(Continued)

Witnesseth:

1. This contract shall not be deemed, held or construed anywhere as creating a co-partnership between the parties to it, and shall be held to be merely the convenient means and method of performing the operation and contract as hereinafter described and for recompensing each party for his share or interest in the profits or losses that may come, arise or grow in connection therewith, there being no other practicable mode or method at this time known to the parties in carrying on said operation, performing and completing the same, and this agreement shall supersede all previous oral or written agreements between the parties in in relation thereto, and now embodies the entire agreement between the parties.

2. That the parties hereto, or some of them, have entered or are about to enter into a contract (or a subcontract) with the United States of America in relation to the following:

Contract No. 12r-14825, Spec. 1062, earth-work, pipelines and structures, Laterals 59.3 to 69.8 and sublaterals and Diversion Channels.  
Roza Division, Yakima Project, Washington.

That said contract (or subcontract) may be signed by the parties hereto, and as a party thereto as a partnership, or may be signed by one or some of the parties hereto, as the principal contractor, yet regardless of how said instrument may be signed and executed, or the manner thereof, it is agreed that it was understood between the parties



Defendants' Macri Exhibit No. 1—(Continued)  
hereto that the same was executed for and on behalf of the parties hereto in proportion to their interest herein, and as hereinafter stated, and that it would be performed by the parties hereto under this Agreement of Joint Venture, and that any performance bonds, or otherwise, might be required to be executed and delivered through or by such insurance or surety company or companies as might be engaged by the parties hereto in that regard.

It is further agreed that whether said contract (or subcontract) or said bond (or bonds) or insurance policy, bear a date prior to this agreement or subsequent hereto, it is to be of no controlling effect as between the parties and that regardless of the date of any of said instruments they were or are to be executed, and are to be treated as being executed and delivered in pursuance to this Agreement of Joint Venture regardless of their respective dates.

3. The name of this joint venture shall be known and designated as Macri & Company. Its office and principal place of business during its existence and until mutually agreed otherwise shall be at 27th Avenue South and Holgate Street, Seattle, Washington. All funds and moneys of said joint venture shall be deposited and kept in the Seaboard Branch Seattle First National Bank at Seattle, Washington, or any branch thereof, as may be convenient to the operations of the joint venture, and as mutually agreed upon by the members thereof, and withdrawals of said funds shall be



## Defendants' Macri Exhibit No. 1—(Continued)

signed and counter-signed in such manner and form as the parties may mutually direct by written directions to the bank or depository from time to time.

4. Each of the parties hereto acknowledge their interest in the performance of said contract (or subcontract) and their agreement to share the profits and losses coming, arising or growing out of the same in the proportions as hereinafter stated, and this agreement further evidences the oral engagement and understanding of each of the parties hereto that it was a part of the engagement imposed upon each of the parties hereto to join, jointly and severally, in any indemnification agreement which any insurance, surety or casualty company might require incident to its execution of said bonds. This instrument, therefore, further evidences the obligation of the parties to execute such indemnification agreement as said insurance company may require, and may be treated and considered as conclusive evidence of the interest of each of the parties hereto in said project, and their agreement and obligation to execute said indemnifying agreements in accordance with their understanding had and accomplished heretofore in reference to said matters.

5. It is further understood that the interest of the first party in said joint venture shall be forty-seven  $\frac{2}{3}$  per cent ( $47\frac{2}{3}\%$ ), that of the second party shall be twenty per cent ( $20\%$ ), and that of the third party shall be thirty-two  $\frac{1}{3}$  per cent ( $32\frac{1}{3}\%$ ),

Defendants' Maeri Exhibit No. 1—(Continued)  
and that of the fourth party shall be.....per cent  
(.....%), and that the division of profits and  
losses that may come, arise, grow or happen shall  
be divided, shared and borne by the parties in con-  
nection with this joint venture, in those respective  
proportions; that in the event of any controversy  
or difference of opinion arising between the parties  
hereto, and their respective representatives upon  
the project, or in connection with any matters,  
things, details, problems or questions in connection  
with or incident to the carrying out of said contract  
(or subcontract) then such controversy or differ-  
ence, or question, shall be finally and conclusively  
settled, decided and determined by a vote of the  
parties hereto, and in voting on said question, con-  
troversy or difference each of the parties hereto  
shall have the right to vote according to, or in pro-  
portion to, their contribution to the original work-  
ing capital, and for the sake of convenience the  
total number of votes shall be regarded as 200 in  
number, of which each party hereto shall have the  
following number of votes: First party  $47\frac{2}{3}$  votes;  
second party 20 votes; third party  $32\frac{1}{3}$  votes;  
fourth party.....votes, which is in proportion to  
the approximate original capital investment and  
liability of each of the parties hereto; and a ma-  
jority vote in amount of said total funds shall  
decide any question or controversy presented.

6. It is further understood and agreed, in con-  
nection with the performance of said contract (or  
subcontract) of this joint venture, that each of the

Defendants' Macri Exhibit No. 1—(Continued)

parties hereto will, as the demands of the operation require, furnish an amount of working capital in the proportion of each of the respective parties at interest in said joint venture, for the satisfactory and efficient operation of said joint venture in the performance of said contract (or subcontract) or said operation.

Such equipment as any member of the joint venture may have available may be furnished to said joint venture as needed and required and by whichever member thereof that may have the same available, and the member furnishing the same shall be entitled to charge and receive as an expense of operation on said project, the reasonable rental value of any such equipment so furnished and delivered, which said rental to be charged shall be fixed and determined by an informal memorandum in writing, signed by at least two members of the joint venture, at or before the time of the delivery of the same for use upon the project. If none of the parties hereto has sufficient and adequate machinery, tools and equipment to carry on said operation, then such other additional machinery or equipment as may be required will be procured from others, and such rental, whether paid to one of the parties hereto or to any other party, shall be treated as an expense of operation and paid for accordingly.

7. (Insert herein whatever agreement that the parties may desire to be inserted in reference to who, or which members of the joint venture shall

Defendants' Macri Exhibit No. 1—(Continued)  
have charge of the office affairs, the field operations, and superintending of operations, including purchases and otherwise. These are matters that will have to be covered as each joint venture is formed.)

This project will be under the supervision of Sam Macri and it is understood and agreed that his decisions shall be binding unless taken up by the parties interested herein as a whole and voted on in accordance with the terms of this agreement. No withdrawals will be made by any of the parties to this agreement. Equipment rental will be paid to the parties at the OPA Ceiling Prices, now in effect, at the termination of the contract.

8. Upon the completion of the performance of said subcontract, as aforesaid, a full and complete account of all charges and expenses of whatever kind, name or nature, properly incurred in the performance of said contract, shall be taken and had between the parties, and all losses sustained and any and all profits realized, shall be borne and shared equally between the parties hereto, as their interests may appear.

9. This agreement does not include any other joint account transactions made by the parties hereto which the parties may have heretofore or later entered into, unless the parties agree in writing in reference thereto, and agree that the same is within the scope of this joint venture agreement, nor shall it have any application to any transactions made by either of the parties hereto inde-



Defendants' Macri Exhibit No. 1—(Continued)  
pendently and on his or its own account, and without the aid of the other, and that this joint venture between the parties hereto shall cease and terminate upon the completion of the contract (or subcontract) as hereinbefore described, and upon the receipt of all moneys due this joint venture and the payment of all its debts and obligations, and the distribution of its assets; and neither of the parties hereto shall at any time represent to any person whatsoever that their association is in the nature of a partnership.

10. In the event of the death or disability of any one of the parties to this joint adventure, the remaining party or parties shall be entitled to carry on the work to completion, and accept final payment, without the intervention or interference from the heirs, executor, or administrator, or representative of the deceased party, to and with the same effect as though such survivor or survivors were the original sole contracting party, provided, however, that upon completion of the work, the survivor or survivors shall account to the proper representative of such deceased or disabled party for his share of the profits or losses.

All the terms and conditions of this Agreement shall inure to and be binding upon the parties hereto and their respective heirs, successors and personal representatives.

In Witness Whereof, these presents have been executed and signed the day and date first above written, the second party executing and delivering



Defendants' Macri Exhibit No. 1—(Continued)  
 the same by its executive officers in pursuance to  
 due authority extended and granted therefor by  
 appropriate resolution of its Board of Trustees  
 or Directors, now of record in its corporate record  
 book of corporate proceedings.

**MACRI & COMPANY**

By **SAM MACRI**

First Party.

/s/ **A. J. GOERIG**

Second Party.

/s/ **CLYDE PHILP**

Third Party.

.....

Fourth Party.

---

**DEFENDANTS' MACRI EXHIBIT No. 2**

**Joint Venture Agreement**

**Defendant Macri's Exhibit No. "8"**

This Joint Venture Agreement, Made and entered  
 into as of this date December 11, 1943, by and  
 between Sam Macri, Joe Macri and Don Macri,  
 copartners doing business as Macri & Company of  
 Seattle, Washington herein referred to as First  
 Party, and A. J. Goerig, an individual herein re-  
 ferred to as Third Party, and.....herein referred  
 to as Fourth Party.

Witnesseth:

1. This contract shall not be deemed, held or construed anywhere as creating a co-partnership between the parties to it, and shall be held to be merely the convenient means and method of performing the operation and contract as hereinafter described and for recompensing each party for his share or interest in the profits or losses that may come, arise or grow in connection therewith, there being no other practicable mode or method at this time known to the parties in carrying on said operation, performing and completing the same, and this agreement shall supersede all previous oral or written agreements between the parties.

2. That the parties hereto, or some of them, have entered or are about to enter into a contract (or a subcontract) with the United States of America in relation to the following:

Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sub-Lateral, East Turbine Laterals Sta. 260+00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

That said contract (or subcontract) may be signed by the parties hereto, and as a party thereto as a partnership, or may be signed by one or some of the parties hereto, as the principal contractor, yet regardless of how said instrument may be signed and executed, or the manner thereof, it is agreed that it was understood between the parties hereto that the same was executed for and on behalf

of the parties hereto in proportion to their interest herein, and as hereinafter stated, and that it would be performed by the parties hereto under this Agreement of Joint Venture, and that any performance bonds, or otherwise, might be required to be executed and delivered through or by such insurance or surety company or companies as might be engaged by the parties hereto in that regard.

It is further agreed that whether said contract (or subcontract) or said bond (or bonds) or insurance policy, bear a date prior to this agreement or subsequent hereto, it is to be of no controlling effect as between the parties and that regardless of the date of any of said instruments they were or are to be executed, and are to be treated as being executed and delivered in pursuance to this Agreement of Joint Venture regardless of their respective dates.

3. The name of this joint venture shall be known and designated as Macri & Company. Its office and principal place of business during its existence and until mutually agreed otherwise shall be at 27th Avenue South and Holgate Street, Seattle, Washington. All funds and moneys of said joint venture shall be deposited and kept in the Seaboard Branch Seattle First National Bank at Seattle, Washington, or any branch thereof, as may be convenient to the operations of the joint venture, and as mutually agreed upon by the members thereof, and withdrawals of said funds shall be signed and counter-signed in such manner and form

as the parties may mutually direct by written directions to the bank or depository from time to time.

4. Each of the parties hereto acknowledge their interest in the performance of said contract (or subcontract) and their agreement to share the profits and losses coming, arising or growing out of the same in the proportions as hereinafter stated, and this agreement further evidences the oral engagement and understanding of each of the parties hereto that it was a part of the engagement imposed upon each of the parties hereto to join, jointly and severally, in any indemnification agreement which any insurance, surety or casualty company might require incident to its execution of said bonds. This instrument, therefore, further evidences the obligation of the parties to execute such indemnification agreement as said insurance company may require, and may be treated and considered as conclusive evidence of the interest of each of the parties hereto in said project, and their agreement and obligation to execute said indemnifying agreements in accordance with their understanding had and accomplished heretofore in reference to said matters.

5. It is further understood that the interest of the first party in said joint venture shall be forty-seven  $\frac{2}{3}$  per cent ( $47\frac{2}{3}\%$ ), that of the second party shall be twenty per cent (20%), and that of the third party shall be thirty-two  $\frac{1}{3}$  per cent ( $32\frac{1}{3}\%$ ), and that of the fourth party shall be.....per cent (.....%), and that the division of profits and

losses that may come, arise, grow or happen shall be divided, shared and borne by the parties in connection with this joint venture, in those respective proportions; that in the event of any controversy or difference of opinion arising between the parties hereto, and their respective representatives upon the project, or in connection with any matters, things, details, problems or questions in connection with or incident to the carrying out of said contract (or subcontract) then such controversy or difference, or question, shall be finally and conclusively settled, decided and determined by a vote of the parties hereto, and in voting on said question, controversy or difference each of the parties hereto shall have the right to vote according to, or in proportion to, their contribution to the original working capital, and for the sake of convenience the total number of votes shall be regarded as 200 in number, of which each party hereto shall have the following number of votes: First party  $47\frac{2}{3}$  votes; second party 20 votes; third party  $32\frac{1}{3}$  votes; fourth party.....votes, which is in proportion to the approximate original capital investment and liability of each of the parties hereto; and a majority vote in amount of said total funds shall decide any question or controversy presented.

6. It is further understood and agreed, in connection with the performance of said contract (or subcontract) of this joint venture, that each of the parties hereto will, as the demands of the operation require, furnish an amount of working capital



in the proportion of each of the respective parties at interest in said joint venture, for the satisfactory and efficient operation of said joint venture in the performance of said contract (or subcontract) or said operation.

Such equipment as any member of the joint venture may have available may be furnished to said joint venture as needed and required and by whichever member thereof that may have the same available, and the member furnishing the same shall be entitled to charge and receive as an expense of operation on said project, the reasonable rental value of any such equipment so furnished and delivered, which said rental to be charged shall be fixed and determined by an informal memorandum in writing, signed by at least two members of the joint venture, at or before the time of the delivery of the same for use upon the project. If none of the parties hereto has sufficient and adequate machinery, tools and equipment to carry on said operation, then such other additional machinery or equipment as may be required will be procured from others, and such rental, whether paid to one of the parties hereto or to any other party, shall be treated as an expense of operation and paid for accordingly.

7. (Insert herein whatever agreement that the parties may desire to be inserted in reference to who, or which members of the joint venture shall have charge of the office affairs, the field operations, and superintending of operations, including purchases and otherwise. These are matters that will

have to be covered as each joint venture is formed.)

This project will be under the supervision of Sam Macri and it is understood and agreed that his decisions shall be binding unless taken up by the parties interested herein as a whole and voted on in accordance with the terms of this agreement. No withdrawals will be made by any of the parties to this agreement. No withdrawals will be made by any of the parties to this agreement. Equipment rental will be paid to the parties at the OPA Ceiling Prices, now in effect, at the termination of the contract.

8. Upon the completion of the performance of said subcontract, as aforesaid, a full and complete account of all charges and expenses of whatever kind, name or nature, properly incurred in the performance of said contract, shall be taken and had between the parties, and all losses sustained and any and all profits realized, shall be borne and shared equally between the parties hereto, as their interests may appear.

9. This agreement does not include any other joint account transactions made by the parties hereto which the parties may have heretofore or later entered into, unless the parties agree in writing in reference thereto, and agree that the same is within the scope of this joint venture agreement, nor shall it have any application to any transactions made by either of the parties hereto independently and on his or its own account, and without the aid of the other, and that this joint venture

between the parties hereto shall cease and terminate upon the completion of the contract (or subcontract) as hereinbefore described, and upon the receipt of all moneys due this joint venture and the payment of all its debts and obligations, and the distribution of its assets; and neither of the parties hereto shall at any time represent to any person whatsoever that their association is in the nature of a partnership.

10. In the event of the death or disability of any one of the parties to this joint adventure, the remaining party or parties shall be entitled to carry on the work to completion, and accept final payment, without the intervention or interference from the heirs, executor, or administrator, or representative of the deceased party, to and with the same effect as though such survivor or survivors were the original sole contracting party, provided, however, that upon completion of the work, the survivor or survivors shall account to the proper representative of such deceased or disabled party for his share of the profits or losses.

All the terms and conditions of this Agreement shall inure to and be binding upon the parties hereto and their respective heirs, successors and personal representatives.

In Witness Whereof, these presents have been executed and signed the day and date first above written, the second party executing and delivering the same by its executive officers in pursuance to due authority extended and granted therefor by

appropriate resolution of its Board of Trustees or Directors, now of record in its corporate record book of corporate proceedings.

MACRI & COMPANY

First Party.

A. J. GOERIG

Second Party.

CLYDE PHILP

Third Party.

.....

Fourth Party.

---

DEFENDANTS GOERIG'S AND PHILP'S  
EXHIBIT No. 1

(Defendants Philp & Goerig's Exhibit No. "9")  
Agreement Terminating Joint Ventures

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig and Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

- (1) A corporation as formed under the name and style of Macri Developing For The purpose and intention of developing Real Estate and building 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.
- (2) Contract No. 2912, construction on Secondary State Highway No. 1-S. Johnson & Jim Creek Bridges, Cowlitz County, Washington.
- (3) Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sublaterals and Diversion Channels, Rosa Division, Yakima Project, Washington.
- (4) Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260+00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Rosa Division, Yakima Project, Washington.
- (5) The work to be done on Project 9536, Contract W7412-eng-1, duPont RPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Subcontract No. 4, Richland, Washington, as it now exists.



That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4), and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear herein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts,

then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result  $52\frac{1}{3}\%$  thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

\* \* \* \* \*

(4) In determining whether any loss of any of said projects results to first party, it is agreed that no rental on any first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project (1), known and designated as "Val Vue Real Estate Develope."

(5) It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Maeri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second parties upon Project (5) are to receive or

be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum \$19,104.00, is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

(6) It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint ventures is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified.

(7) It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion

or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

(8) It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

(9) In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation, and has performed duties in that capacity, each of second parties will sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account,

corporate records, and financial set-up along, the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, Concurrently with the execution of these presents, in resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY

By DON MACRI

One of said firm, but authorized to act  
in this matter for it.

First Party

CLYDE PHILP

A. J. GOERIG

Individually and d/b/a Goerig & Philp  
and/or A. J. Goerig Construction Co.

Second Parties



[Endorsed]: No. 11722. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

Nos. 11722, 11723, 11724, 11725, 11726

[Title of Cause.]

ADOPTION OF POINTS ON APPEAL

Come now the appellants A. J. Goerig and Clyde Philp and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as errors all such matters and all adverse rulings.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig & Philp.

Copy of within Adoption of Points on Appeal served on Appellee Continental Casualty Company by mailing a true copy thereof to Skeel, McKelvy, Henke, Evenson & Uhlmann, 914 Insurance Building, Seattle, Washington, and on defendants Macris by mailing a true copy thereof to Brethorst, Holman, Fowler & Dewar, 1710 Hoge Building, Seattle, Washington, on September 2, 1947.

/s/ KENNETH C. HAWKINS

Of Brown & Hawkins,

Attorneys for Appellants

Goerig & Philp.

[Endorsed]: Filed Sept. 5, 1947.

No. 11723

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG and CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a corporation, and J. W. MORRISON, an individual, doing business as J. W. Morrison company,

Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

FILED  
JUN 20 1911  
U. S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
SOUTHERN DIVISION



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG and CLYDE PHILP,  
vs. Appellants,

CONTINENTAL CASUALTY COMPANY, a corporation, and J. W. MORRISON, an individual, doing business as J. W. Morrison company,  
Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

---





# INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer .....	10
Answer and Cross-Complaint.....	14
Appeal:	
Notice of.....	34
Statement of Points on.....	36
Bond for Costs on.....	38
Bond for Costs on Appeal.....	38
Clerk's Certificate .....	40
Complaint .....	2
Exhibit A—Statement of Work Performed	9
B—List of Payments Received ...	9
Findings of Fact and Conclusions of Law.....	20
Conclusions of Law.....	28
Findings of Fact.....	21
Judgment .....	30
Motion for New Trial.....	32
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	34
Order Denying Motion for New Trial.....	34
Order on Pre-Trial.....	19
Reply and Answer to Answer and Cross-Com- plaint of Continental Casualty Company....	17
Statement of Points on Appeal.....	36
Stipulation .....	42



NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HALVERSON & APPLGATE,

Miller Building,  
Yakima, Washington,

Attorneys for the use Plaintiff  
and Appellee.

BROWN & HAWKINS,

Miller Building,  
Yakima, Washington,

Attorneys for A. J. Goerig  
and Clyde Philp,  
Defendants and Appellants.

SKEEL, McKELVY, HENKE, EVENSON &  
UHLMANN,

Insurance Building,  
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Court No. 251

THE UNITED STATES OF AMERICA FOR  
THE USE OF J. W. MORRISON, an indi-  
vidual d/b/a J. W. Morrison Company,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,  
CLYDE PHILP, A. J. GOERIG, SAM  
BURNSED and JOHN DOE McCARTY, co-  
partners and joint adventurers d/b/a Macri &  
Company, and CONTINENTAL CASUALTY  
COMPANY, an Indiana Corporation,

Defendants.

## COMPLAINT

Comes Now the Plaintiff and for Cause of Action  
against the Defendants above named and each of  
them alleges:

### 1.

That at all times herein mentioned the Plaintiff  
J. W. Morrison was and now is an individual doing  
business as J. W. Morrison Company and that he  
has duly filed his business certificate as by law  
required.



## 2.

That this action is brought in the name of the United States of America as Plaintiff for the use of J. W. Morrison, an individual doing business as J. W. Morrison Company under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c. 642, sections 1 and 2, 49 Statutes at Large 793, 794). Said Plaintiff at all times herein set forth has been and now is a citizen of the State of Washington.

## 3.

That at all times herein mentioned the Defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp, A. J. Goerig, Sam Burnsed and John Doe McElarty (whose true Christian name is unknown to Plaintiff) were and now are co-partners or joint adventurers doing business as Macri & Company. That said Defendants will hereafter be referred to as Macri & Company. That at all times said Defendants were and now are citizens of the State of Washington.

## 4.

That at all times herein mentioned the defendant Continental Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such to carry on such surety business in the State of Washington. That said Defendant Continental Casualty Company is a citizen of the State of Indiana.

## 5.

That on or about May 18, 1944, the United States of America through the Department of Interior and Macri & Company made and entered into a certain contract, being Contract No. 12r-14996, for Earthwork, Pipelines and Structures, Laterals 70.1 to 84.6 and Sublaterals, East Turbine Lateral, Station 260+00 to the end, and Sublaterals East Turbine Lateral Wasteway, and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington, Specifications No. 1068, wherein and whereby said Defendant contractors Macri & Company contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50.

## 6.

That on or about May 18, 1944, to secure faithful performance of said contract and prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said Defendants Macri & Company as principals and Continental Casualty Company, an Indiana corporation, as surety, made, executed, and delivered to the United States of America as obligee a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned that if the said Defendants Macri & Company should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract above described, the

said bond should be void, but otherwise to remain in full force and effect. That upon the award of said contract to the Defendants Macri & Company, said bond became binding and ever since has remained in full force and effect.

## 7.

That the aforesaid contract No. 12r 14996 was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to above, which said contract was performed and executed in Yakima County in the Eastern District of the State of Washington.

## 8.

That heretofore and on or about the 21st day of April, 1944, the Defendants Macri & Company entered into a subcontract in writing with J. W. Morrison, as individual d/b/a J. W. Morrison Company, wherein and whereby said Defendants Macri & Company subcontracted to said J. W. Morrison Company the following work at the agreed upon contract price, to-wit:

Item 1—Excavation common for laterals at .29c per cu. yd.

Item 2—Excavation rock for laterals at \$1.00 per cu. yd.

Item 3—Overhaul at .03c per cu. yd.

Item 4—Compacting embankments at .30c per cu. yd.

Item 14—Dry rock paving at \$2.35 per sq. yd.

9.

That said Defendants Macri & Company have in their possession a copy of said written contract above referred to.

10.

That pursuant to said subcontract hereinabove referred to, said subcontractor J. W. Morrison, an individual doing business as J. W. Morrison Company, between on or about May 18, 1944, and October 15, 1945, furnished labor and materials and performed services for said Defendants Macri & Company at their special instance and request of the reasonable and agreed value of \$36,730.85, an itemized list of said work, labor, materials and services furnished and performed by said Plaintiff J. W. Morrison Company being hereto attached marked Exhibit "A" and by reference thereto made a part hereof.

11.

That said J. W. Morrison Company has made repeated demands upon said Macri & Company for payment of said sum of \$36,730.85 but said Defendants Macri & Company and each of them have failed, neglected and refused to pay said amount except the sum of \$29,074.65, an itemized list of said payments being hereto attached marked Exhibit "B" and by reference thereto made a part hereof.

12.

That heretofore and on or about the 7th day of January, 1946, said Defendants Macri & Company

and said Plaintiff J. W. Morrison Company orally agreed that the balance owing from said Defendants to said Plaintiff was the sum of \$7,656.20 and said Plaintiff further agreed that if payment of the said balance owing to him by said Macri & Company was made immediately in cash, said Plaintiff would accept in full settlement of his said account the sum of \$6,869.62; that thereupon said Macri & Company made and delivered to said Plaintiff its check in the amount of \$6,869.62 which was duly endorsed by said J. W. Morrison Company and presented for payment and said check was thereafter returned by the bank upon which it was drawn marked "NSF." That there is now due and owing and unpaid from the said Defendants Macri & Company to the Plaintiff J. W. Morrison Company the sum of \$7,656.20, together with interest thereon at the rate of six per cent per annum from October 15, 1945, until paid.

13.

That more than ninety days have elapsed since the last work, labor and materials were furnished by said J. W. Morrison Company as hereinabove set forth and less than one year has elapsed since the complete performance and final settlement of said Contract No. 12r 14996 was made. The final settlement under said contract was made on October 15, 1945.

14.

That the ground upon which the jurisdiction of this court is invoked is that the action arises under



the Act of Congress referred to above which expressly directs the bringing of said action in this court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the district in which said contract was to be and was performed and completed.

Wherefore, the Plaintiff demands judgment in favor of the United States for the use and benefit of J. W. Morrison d/b/a J. W. Morrison Company against Defendants and each of them in the sum of \$7656.20, together with interest thereon at the legal rate of six per cent per annum from the 15th day of October, 1945, until paid, and for said Plaintiff's costs and disbursements herein expended and incurred and for such other and further relief as to the court may seem meet and proper in the premises.

C. W. HALVERSON,  
J. S. APPELEGATE,

Attorneys for Plaintiff.

State of Washington,  
County of Yakima—ss.

J. W. Morrison, being first duly sworn, on oath deposes and says: That he is the above named individual doing business as J. W. Morrison Company and Plaintiff in the above entitled action; that he has read the foregoing Complaint, knows the contents thereof and the same are true as he verily believes.

J. W. MORRISON.

Subscribed and sworn to before me this 12th day of February, 1946.

C. W. HALVERSON,  
Notary Public in and for the State of Washington,  
residing at Yakima.

### EXHIBIT A

For work performed on Specification 1068, Roza Project according to sub-contract as follows (Revised) :

Item 1—Excavation, Common for Laterals	
109,448.3 cubic yards at \$0.29.....	\$31,740.01
Item 2—Excavation, S. R. for Laterals	
141.7 cubic yards at \$1.00 .....	141.70
Item 3—Overhaul 11,255 Sta. cu. yds. at \$0.03	337.65
Item 4—Compacting Embankments	
3,482 cubic yards at \$0.30 .....	1,044.60
Item 14—Dry Rock paving	
992.8 sq. yds. at \$2.35.....	2,333.08
<hr/>	
Total Sub-Contract.....	\$35,597.04
Force Account Bill No. 1 (allowed for extras)	905.51
Plus Bill Submitted for Structure Excavation performed for Macri & Company on Dry Rock Paving.....	228.30
<hr/>	
Total Work Performed.....	\$36,730.85

### EXHIBIT B

Payments received on monthly estimates (revised) :

8/22/44—July Estimate—No. 1.....	\$ 947.27
10/ 6/44—August “ “ 2.....	4,116.69
11/ 7/44—September “ “ 3.....	5,585.65
11/22/44—October “ “ 4.....	688.29
12/27/44—November “ “ 5.....	2,620.91
1/ 2/45—December “ “ 6.....	1,667.54

2/26/45—Jan.	Estimate No. 7.....	\$ 200.28
3/19/45—February	“ “ 8.....	2,488.68
5/ 3/45—March	“ “ 9.....	8,781.66
8/ 2/45—April	“ “ 10.....	435.00
—May	“ “ 11.....	0.00
8/ 2/45—June	“ “ 12.....	350.94
8/ 2/45—Force Account Bill No. 1....		805.91
		<hr/>
		\$28,709.62
Allowance of 1% for Bond.....		365.03
		<hr/>
Total payments received.....		\$29,074.65
		<hr/> <hr/>

[Endorsed]: Filed Feb. 13, 1946.

[Title of District Court and Cause.]

### ANSWER

Come now the defendants Clyde Philp and A. J. Goerig and for answer to plaintiff's complaint admit, deny and allege as follows:

#### 1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 1.

#### 2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

## 3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation therein contained and particularly deny that these answering defendants were associated with Sam Macri, Joe Macri, Don Macri, Sam Burnsed or John Doe McCarty as co-partners or joint adventurers. These answering defendants allege that any relationship existing between these answering defendants and the other above named defendants was terminated prior to the incurring of the liability, if any, alleged or averred in plaintiff's complaint.

## 4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 10.

For answer to paragraph 10 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 11.

For answer to paragraph 11 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 12.

For answer to paragraph 12 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 13.

For answer to paragraph 13 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.



14.

For answer to paragraph 14 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against J. W. Morrison, an individual d/b/a J. W. Morrison Company, for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

A. J. Goerig and

Clyde Philp.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

C. W. HALVERSON,

J. S. APPLGATE,

Attorneys for Plaintiff.

Filed May 17, 1946.

[Title of District Court and Cause.]

## ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

### First Defense

#### I.

This answering defendant admits Paragraphs 1, 2, 3, 4, 5, 6, 7, 13 and 14 of plaintiff's complaint.

#### II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs 8, 9, 10, 11, and 12 and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$7,656.20 or any other sum whatsoever or at all.

### Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp, A. J. Goerig, Sam Burnsed and John Doe McCarty, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

#### I.

This cross-complaining defendant, Continental

Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Plaintiff's complaint.

## II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

## III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Company, then under the terms of said bond application and said bond, the said defendant, Continental Cas-

ualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney's fees, against each of the above named co-defendants and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff's complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individuals defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN.

By WILLARD E. SKEEL.

United States of America,  
State of Washington,  
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has

read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal] K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Received March 4, 1946.

GRANVILLE EGAN,  
Atty. for MGB.  
BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
Attys. for Defts. Macri.

Filed March 6, 1946.

---

[Title of District Court and Cause.]

REPLY AND ANSWER TO ANSWER AND  
CROSS-COMPLAINT OF CONTINENTAL  
CASUALTY COMPANY

Come now A. J. Goerig and Clyde Philip, two of the above named defendants, and for reply and answer to the answer and cross-complaint of Continental Casualty Company, a corporation, admit, deny and allege as follows:

1.

For reply to paragraphs 1 and 2 of the defendant's first defense these answering defendants deny each and every allegation admitted by said defendant therein.



## 2.

For answer to paragraph 1 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained or therein replied to.

## 3.

For answer to paragraph 2 of said cross-complaint these answering defendants deny the same and each and every allegation therein contained, and particularly deny that the defendant Macri & Company executed and signed any application directed to the Continental Casualty Company for and on behalf of these answering defendants.

## 4.

For answer to paragraph 3 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully replied and answered to defendant Continental Casualty Company's answer and cross-complaint pray that these answering defendants have and recover judgment against said defendant Continental Casualty Company for their costs and disbursements taxable by law.

NAT. U. BROWN,  
KENNETH C. HAWKINS,  
Attorneys for defendants  
A. J. Goerig and  
Clyde Philp.

Filed Aug. 26, 1947.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

C. W. Halverson appearing at attorney for plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company.

It is stipulated that any party to this cause may offer in evidence any of the documents marked for identification in cause No. 267 without objection as to signatures and authenticity of such document.

It is further stipulated that the use plaintiff is entitled to judgment in the amount of \$7,262.91 with interest from the date of judgment, subject to the judgment being appropriately fixed as to judgment debtors, all under Specification #1068.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the Continental Cas-

ualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 255, 257 and 267 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulation be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

Filed Jan. 27, 1947.

---

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on duly and regularly for pre-trial hearing on the 8th day of January, 1947, and for trial on the 19th day of Feb-

ruary, 1947, before the Hon. Sam M. Driver, Judge of the above entitled court, the Use-Plaintiff, J. W. Morrison, an individual d/b/a J. W. Morrison Company, appearing by his attorney, C. W. Halverson of Halverson & Applegate, the co-partnership and joint adventurers consisting of Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, d/b/a Macri & Company, appearing by two of its partners and joint adventurers, Sam Macri and A. J. Goerig, and Sam Macri, Joe Macri and Don Macri, appearing by their attorneys, Thomas Holman and A. T. Bateman of Brethorst, Holman, Fowler & DeWar, attorneys for said Defendants Macri, and A. J. Goerig and Clyde Philp appearing by their attorneys, Kenneth Hawkins of the firm of Brown & Hawkins, and Continental Casualty Company, a corporation, appearing by its attorney Willard E. Skeel of Skeel, McKelvy, Henke, Evenson and Uhlmann, and the Hon. Sam M. Driver, Judge, having heard the evidence submitted, and having considered the stipulations and agreements entered into in open court, and being fully advised in the premises, makes the following

### Findings of Fact

1. That at all times herein mentioned, the plaintiff, J. W. Morrison, was and now is an individual d/b/a J. W. Morrison Company, and that he has filed his business certificate as by law required. That at all times herein mentioned, said J. W. Morrison was and now is a citizen and resident of Spokane, State of Washington.

## 2.

That at all times herein mentioned, the Defendants Sam Macri, Joe Macri and Don Macri, Clyde Philp and A. J. Goerig were co-partners and joint adventurers d/b/a Macri & Company. That said co-partners and joint adventurers will hereafter be referred to as Macri & Company. That at all times herein mentioned, said parties were and now are citizens and residents of Seattle, State of Washington.

## 3.

That at all times herein mentioned, the Defendant Continental Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such to carry on such surety business in the State of Washington. That said Defendant Continental Casualty Company at all times herein mentioned was and now is a citizen and resident of the State of Indiana.

## 4.

That this action is brought in the name of the United States of America as Plaintiff for the use of J. W. Morrison, an individual d/b/a J. W. Morrison Company under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (Chap. 642, Sec. 1 and 2, 49 Statutes at Large, 793, 794).



## 5.

That on or about the 18th day of May, 1944, the United States of America through the Department of Interior and Macri & Company made and entered into a certain contract, being contract No. 12r-14996 for earthwork, pipelines, and structures, laterals 70.1 to 84.6 and Sublaterals, East Turbine lateral, station 260-99 in the end, and Sublaterals, East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington; Specifications #1068, wherein and whereby said Defendant contractors, Macri & Company contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50. That a copy of said contract has been admitted in evidence and by reference thereto the same is made a part hereof as though fully set forth herein.

## 6.

That on or about the 18th day of May, 1944, to secure faithful performance of said contract and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said Defendant Macri & Company as principals and Continental Casualty Company, an Indiana corporation, as surety, made, executed and delivered to the United States of America as obligee a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned

that if said Defendant Macri & Company should promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in the contract above described, said bond would be void, but otherwise to remain in full force and effect. That upon the award of said contract to the Defendant Macri & Company, said bond became binding and ever since has remained in full force and effect. That said bond or undertaking was and is by its terms binding upon said surety and upon said principals and each of them, their heirs, executors, successors and assigns and has been at all times since its issuance and now is in full force and effect, a copy of said bond having been admitted in evidence and by reference thereto is made a part hereof as though fully set forth herein.

7.

That the aforesaid contract No. 12r-14996 was and now is a contract for the prosecution and completion of a public work of the United States within the act of Congress referred to above, which said contract was performed and executed at Yakima County, in the Eastern District of the State of Washington.

8.

That heretofore and on or about the 21st day of April, 1944, the Defendant Macri & Company entered into a sub-contract in writing with J. W. Morrison, an individual d/b/a J. W. Morrison Company, wherein and whereby said Defendant Macri

& Company, sub-contracted to said J. W. Morrison Company, the following work at the agreed upon contract price, to-wit:

Item 1. Excavation, Common for Laterals, @ .29c per cu. yd.

Item 2. Excavation rock for Laterals @ \$1.00 per cu. yd.

Item 3. Overhaul at .03c per cu. yd.

Item 4. Compacting Embankments @ .30c per cu. yd.

Item 14. Dry Rock Paving @ \$2.35 per sq. yd.

9.

That pursuant to said sub-contract hereinabove referred to, said Sub-Contractor, J. W. Morrison, an individual d/b/a J. W. Morrison Company, between on or about May 18, 1944, and October 15, 1945, furnished labor and materials and performed services for said Defendant Macri & Company at their special instance and request of the reasonable and agreed value of \$7262.91 over and above all payments made by the Defendant to said Use-Plaintiff; that the parties to the above entitled action through their respective counsel of record have stipulated and agreed in open court that the Use-Plaintiff, J. W. Morrison, is entitled to a judgment in the amount of \$7262.91 with interest on said amount at 6% from date of judgment until paid, subject to the judgment's being appropriately fixed as to judgment debtors, all under Specifications #1068. That the Defendants Sam Macri, Joe Macri,

Don Macri, Clyde Philp, and A. J. Goerig, co-partners and joint adventurers entered into the subcontract above referred to with the Use-Plaintiff and said parties and each of them are indebted to the Use-Plaintiff in the sum of \$7262.91 with interest at 6% from date of judgment, which sum is due and unpaid. That all of the labor, materials and services so furnished and performed by the Use-Plaintiff for the Defendant Macri & Company were furnished and performed on Roza Division, Yakima project, Washington, Specifications No. 1068, within the Eastern District of Washington.

## 10.

That more than ninety days have elapsed since the last of said work, labor and materials so furnished and performed by said Use-Plaintiff J. W. Morrison Company as hereinabove set forth. That the complete performance and final settlement of said contract No. 12r-14996, between Macri & Company and the United States of America through the Department of Interior, was made on or about October 15, 1945, and less than one year has elapsed since said date and the filing of the complaint by the Use-Plaintiff and the commencement of this action in the above entitled court.

## 11.

That the ground upon which the jurisdiction of this court is invoked is that the action arises under the Act of Congress referred to above which ex-

pressly directs the bringing of such an action in this court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the district in which said contract was to be and was performed and executed and the labor and materials furnished and performed by the Use-Plaintiff for the Defendant Macri & Company.

## 12.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above referred to, and as part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things said application for bond contains the following words and phrases, to-wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."



From the foregoing Findings of Fact, the court makes the following

### Conclusions of Law

That judgment should be entered herein as follows:

1. That the Use-Plaintiff, J. W. Morrison d/b/a J. W. Morrison Company should have and recover judgment against the Defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company, and against Continental Casualty Company, an Indiana corporation, and each of them, in the sum of \$7262.91, which said amount should bear interest at the rate of six per cent per annum from the date of judgment until paid, and for judgment for the Use-Plaintiff's costs and disbursements herein expended and to be taxed herein.

2. That the Defendant Continental Casualty Company, an Indiana corporation, should have and recover judgment against the Defendants, Sam Macri, Joe Macri, Don Macri, Clyde Philip, and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and each of them in the amount of \$7,262.91 without interest thereon, together with a reasonable attorney's fee in the amount of \$225.00, together with their costs and disbursements herein incurred with interest thereon at the rate of 6 per cent per annum from the date of judgment until paid.

3. That the Cross-Complaint of the Defendants Sam Macri, Joe Macri, and Don Macri against the Defendants Clyde Philp and A. J. Goerig, be dismissed without costs.

4. That the Cross-Complaint of the Defendants A. J. Goerig and Clyde Philp against the Defendants Sam Macri, Joe Macri, and Don Macri be dismissed without costs.

Dated this 1st day of May, 1947.

/s/ SAM M. DRIVER,  
Judge.

Presented by:

WILLARD E. SKEEL,  
Of Skeel, McKelvy, Henke,  
Evenson & Uhlmann,  
Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil Action No. 251

THE UNITED STATES OF AMERICA for the  
use of J. M. MORRISON, an individual d/b/a  
J. W. Morrison Company,  
Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,  
CLYDE PHILP, A. J. GOERIG, SAM  
BURNSED, and JOHN DOE McCARTY,  
co-partners and joint adventurers d/b/a Macri  
& Company and CONTINENTAL CAS-  
UALTY COMPANY, an Indiana corporation,  
Defendants.

### JUDGMENT

The above entitled case having come on duly and  
regularly for pre-trial hearing on January 7, 1947,  
and for trial on February 19, 1947, before the Hon.  
Sam M. Driver, District Judge of the above entitled  
court, the parties appearing in person and by their  
respective counsel of record herein, and the court  
having heretofore made it Findings of Fact and  
Conclusions of Law and being fully advised in the  
premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Use-Plaintiff, J. W. Morrison, an individual d/b/a J. W. Morrison Company, have and recover judgment against the defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company, and Continental Casualty Company, an Indiana Corporation, and each of them, in the sum of \$7262.91, together with interest thereon at the rate of six per cent per annum from the date hereof until paid, and for Use-Plaintiff's costs and disbursements herein expended and incurred in the amount of \$41.50, and

It Is Further Ordered, Adjudged and Decreed that the Continental Casualty Company, an Indiana corporation, have and recover judgments against the Defendants, Sam Macri, Joe Macri, Don Macri, Clyde Philp, and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company, and each of them in the amount of \$7,262.91 without interest thereon, together with an reasonable attorneys' fee in the amount of \$225 together with their costs and disbursements herein incurred in the amount of \$ none, but with interest thereon at the rate of 6% per annum from the date of judgment until paid,

It Is Further Ordered, Adjudged and Decreed that the cross-complaint of the Defendants Sam Macri, Joe Macri and Don Macri, against the defendants Clyde Philp and A. J. Goerig, be and the same is hereby dismissed without costs, and

It Is Further Ordered, Adjudged and Decreed that the cross-complaint of the Defendants A. J. Goerig and Clyde Philp against the Defendants Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Dated this 1st day of May, 1947.

SAM M. DRIVER,

Judge.

Presented by:

WILLARD E. SKEEL,

Of Skeel, McKelvy, Henke,

Evenson & Uhlmann,

Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.

---

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury and adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;



3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or decision;

7. Error in law occurring at the trial;

8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,  
KENNETH C. HAWKINS,  
Attorneys for Defendants  
A. J. Goerig and  
Clyde Philp.

Copy received this 12th day of May, 1947.

HALVERSON & APPLGATE.

Filed May 12, 1947.

[Title of District Court and Cause.]

## ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is

Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 27th day of May, 1947.

SAM M. DRIVER,  
Judge.

Presented by William E. Skeel.

Filed May 27, 1947.

---

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for

the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 27th day of May, 1947.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants

A. J. Goering and

Clyde Philp.

Copies mailed to: Halverson & Applegate, Miller Bldg., Yakima, Wash.; Granville Eagan, 565 Empire Bldg., Seattle, Wash.; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LAFRAMBOISE,

Clerk,

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS A. J. GOERIG'S AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the use plaintiff, J. W. Morrison, for the following reasons:

1. There was no evidence introduced establishing the date of the delivery of labor and materials on specification 1068 by the use plaintiff or establishing the date the use plaintiff entered into the sub-contract for the furnishing of labor or materials, and the finding of the court with respect to such dates is not based upon any evidence of record.

2. Goerig and Philp were not liable for any obligations incurred by Macri & Company after the date of the termination agreement. There is no showing that the obligation on which the use plaintiff sued was incurred prior to the termination agreement.

3. The materials or labor furnished by the use plaintiff were furnished with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to 1068 and were not therefore liable for any obligations of Macri & Company with respect to specification 1068.

II. The United States District Court was in error in entering Judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the reasons set forth above, and in addition thereto for the following reasons.

1. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

2. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

3. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

4. The "silent" partnership was terminated prior to affixing of liability on the bond.

5. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

6. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants.

Filed July 30, 1947.



[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Clyde Philp, and A. J. Goerig, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a Corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto J. W. Morrison, an Individual, d/b/a J. W. Morrison Company; Sam Macri, Joe Macri, Don Macri, Sam Bursed, John Doe McCarty, d/b/a Macri & Company, and Continental Casualty Company, an Indiana Corporation, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That

Whereas, the above named Plaintiff, J. W. Morrison, an Individual, d/b/a J. W. Morrison Company, on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendant, Sam Macri, et al., Goerig & Philp & Continental Casualty Company in the sum of \$7,262.91, and interest and costs, and the Conti-

mental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said amounts plus \$225 attys. fees.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay J. W. Morrison, d/b/a J. W. Morrison Company, Sam Macri, Joe Macri, Don Macri, Sam Burnsed, John Doe McCarty, d/b/a Macri & Co., all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,  
CLYDE PHILP,  
MANUFACTURERS  
CASUALTY INSURANCE  
COMPANY.

[Seal]      By A. A. NAEF,  
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

United States of America,

Eastern District of Washington—ss.

### CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered 1 to 57, inclusive to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants A. J. Goerig and Clyde Philp. as the same now remains on file and of record in my office and that the same constitutes the record on appeal of said Appellant from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants.

I further certify that "the memorandum decisions of the Honorable Sam M. Driver dated Mar. 27, 1947" as called for in the supplemental designation of the Appellee Continental Casualty is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the fore-

going typewritten record as called for in the designation of record on appeal of the Appellants amount to \$9.70, and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

---

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

---

[Endorsed]: No. 11723. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants,\* vs. Continental Casualty Company, a corporation, and J. W. Morrison, an individual, doing business as J. W. Morrison Company, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

[Adoption of Points on Appeal is set out on page 115 of companion cause No. 11722.]

---

[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint ven-



ture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig and Philp.

SKEEL, McKELVY, HENKE,

EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee  
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.



No. 11724

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG AND CLYDE PHILP,  
Appellants,  
vs.  
CONTINENTAL CASUALTY COMPANY,  
a Corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

FILED  
NOV 28 1947  
U. S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON



No. 11724

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG and CLYDE PHILP,  
Appellants,  
vs.  
CONTINENTAL CASUALTY COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

---





# INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer .....	8
Answer and Cross-Complaint.....	11
Appeal:	
Notice of.....	33
Statement of Points on.....	34
Bond for Costs on.....	35
Bond for Costs on Appeal.....	35
Clerk's Certificate .....	37
Complaint .....	2
Findings of Fact and Conclusions of Law.....	19
Conclusions of Law.....	25
Findings of Fact.....	20
Judgment and Decree.....	27
Motion for New Trial.....	30
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	33
Order Denying Motion for New Trial.....	32
Order on Pre-Trial Hearing.....	17
Reply and Answer to Answer and Cross-Com- plaint of the Continental Casualty Company.	15
Statement of Points on Appeal.....	34
Stipulation .....	40



NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

BROWN & HAWKINS,

Miller Building,  
Yakima, Washington,

Attorneys for A. J. Goerig and  
Clyde Philp, Defendants and Appellants.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

Insurance Building,  
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Court No. 255

THE UNITED STATES OF AMERICA FOR  
THE USE OF UNION CONCRETE PIPE  
CO., INC., a Washington corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,  
CLYDE PHILP and A. J. GOERIG, co-part-  
ners and joint adventurers d/b/a Macri &  
Company, and CONTINENTAL CASUALTY  
COMPANY, an Indiana corporation,

Defendants.

### COMPLAINT

Comes Now the Plaintiff and for cause of action  
against the Defendants above named, and each of  
them, alleges as follows, to-wit:

#### 1.

That at all times herein mentioned the Plaintiff,  
Union Concrete Pipe Co., Inc., is a Washington  
corporation duly licensed to do business in the State  
of Washington and has paid all license fees due  
thereunder.



## 2.

That this action is brought in the name of the United States as Plaintiff for the use of Union Concrete Pipe Co., Inc., under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at Large 793 and 794, Title 40, USCA Section 270 A, 270 B). Said Plaintiff at all times herein set forth has been and now is a citizen of the State of Washington.

## 3.

That at all times herein mentioned the Defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig were and now are co-partners or joint adventurers doing business as Macri & Company. That said Defendants will hereafter be referred to as Macri & Company. That at all times said Defendants were and now are citizens of the State of Washington.

## 4.

That at all times herein mentioned the Defendant Continental Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such as carry on such surety business in the State of Washington. That said defendant and Continental Casualty Company is a citizen of the State of Indiana.

5.

That on or about May 18, 1944, the United States of America through the Department of Interior and Macri & Company made and entered into a certain contract, being Contract No. 1068 of the Roza Division of the Yakima Project, Washington, being also known as Contract No. 12r-14996, wherein and whereby said Defendant contractors, Macri & Company, contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50.

6.

That on or about May 18, 1944, to secure faithful performance of said contract and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said Defendants, Macri & Company, as principals, and Continental Casualty Company, an Indiana Corporation, as surety, made, executed and delivered to the United States of America as obligee a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned that if the said Defendants, Macri & Company, should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract above-described, the said bond should be void, but otherwise to remain in full force and effect. That upon the award of such contract to the Defendants, Macri & Company,

said bond became binding and ever since has remained in full force and effect.

## 7.

That the aforesaid contract No. 1068 was, and now is, a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to above, which said contract was performed and executed in Yakima County in the Eastern District of Washington.

## 8.

That some time previous to the first day of January, 1945, the Plaintiff at the special instance and request of the Yakima Cement Products Co., a subcontractor of Defendants Macri & Company, agreed to deliver to Macri & Company certain concrete pipe. Subsequent thereto said Plaintiff did deliver, and there was accepted by said Macri & Company between the dates of January 26 and June 13, 1945, concrete pipe of the agreed and reasonable value of \$12,602.59. That said Macri & Company dealt directly with said Plaintiff so no written agreement or sub-contract was entered into between them. That upon said price of \$12,602.59 Defendants paid \$6,000.00 on the 21st of April, 1945, and \$1,607.91 on June 6, 1945, said payments being made directly to said Plaintiffs. That all deliveries were made directly to Macri & Company and were unloaded and delivered subject to the direction of Macri & Company and/or its agents.

## 9.

That within ninety days after the last material was furnished to said Defendant Macri & Company, to-wit: On or about the 11th day of August, 1945, said Plaintiff gave written notice to said Defendant of the amount claimed and material furnished, said notice being served by mailing the same by registered mail, postage prepaid, in an envelope addressed to said Defendants at its last known address, and a return card for which was received by said Plaintiff.

## 10.

That Plaintiff has made repeated demands on said Macri & Company for the payment of the unpaid balance of \$4,994.68, but said Defendants, Macri & Company, and each of them, have failed, neglected and refused to pay said amount and the same is now due and owing, together with interest at 6% per annum from June 13, 1945, until paid.

## 11.

That more than ninety days have elapsed since the last work, labor and materials were furnished by Plaintiff, Union Concrete Pipe Co., Inc., as hereinabove set forth, and less than one year has elapsed since the complete performance and final settlement of contract herein referred to as No. 1068 was made. That final settlement under said contract was made on or about October 15, 1945.

## 12.

That the ground upon which the jurisdiction of this Court is invoked is that the action arises under the Act of Congress, referred to above, which expressly directs the bringing of said action in this Court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the District in which said contract was to be and was performed and completed.

Wherefore, Plaintiff demands judgment in favor of the United States for the use and benefit of the Union Concrete Pipe Co., Inc., a corporation, against the Defendants, and each of them, in the sum of \$4,994.68, together with interest thereon at the legal rate of 6% per annum from the 1st day of June, 1945, until paid, and for said Plaintiff's costs and disbursements herein incurred and expended, and for such other and further relief as to the Court may seem meet and proper in the premises.

VELIKANJE & VELIKANJE,  
/s/ K. F. VELIKANJE,  
Of Counsel,  
Attorneys for Plaintiff.

State of Washington,  
County of Yakima—ss.

Frank H. Souther, being first duly sworn, on oath deposes and says: That he is the Secretary-Treasurer of the Union Concrete Pipe Co., Inc., a Wash-



ington corporation, and as such is authorized to verify this complaint; that he has read the foregoing complaint, knows the contents thereof and and the same is true as he verily believes.

/s/ FRANK H. SOUTHER.

Subscribed and Sworn to before me this 2nd day of March, 1946.

[Seal]      /s/ E. F. VELIKANJE,  
Notary Public in and for the State of Washington,  
residing at Yakima.

Filed March 2, 1946.

---

[Title of District Court and Cause.]

### ANSWER

Comes now the defendants Clyde Philp and A. J. Goerig and for answer to plaintiff's complaint admit, deny and alleges as follows:

#### 1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 1.

#### 2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

## 3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation referred to in said paragraph 3 and particularly deny that Clyde Philp or A. J. Goerig were partners, co-partners or joint adventurers with the other named defendants or any of them. That any relationship existing between the defendants and these answering defendants was terminated prior to the incurring of liability, if any, referred to or alleged in plaintiff's complaint.

## 4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 4.

## 5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation therein contained.

## 6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation in said paragraph 6 contained.

## 7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants not being in-

formed as to the truth or falsity thereof deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 8.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 9.

10.

For answer to paragraph 10 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 10.

11.

For answer to paragraph 11 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 11.

12.

For answer to paragraph 12 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each

and every allegation contained in said paragraph 12.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against the Union Concrete Pipe Co., Inc., for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

Clyde Philp and

A. J. Goerig.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff.

Filed May 17, 1946.

---

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint, admits, denies and alleges as follows, to-wit:

## First Defense

## I.

This answering defendant admits Paragraphs I, II, III, V, VI, VII, XI and XII of plaintiff's complaint.

## II.

This answering defendant admits Paragraph IV of plaintiff's complaint and further states that said defendant, Continental Casualty Company, is licensed and authorized to do business in the State of Washington and has paid its last and all other license fees due or owing to said State.

## III.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs VIII, IX, and X and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$4994.68 or any other sum whatsoever or at all.

## Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:



## I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs I, II, III, IV, V, VI, VII, XI, and XII of plaintiff's complaint.

## II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fee whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

## III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Com-

pany, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney's fees, against each of the above named copartners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered the plaintiff's complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individual defendants doing business as Macri & Company, copartners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVEY, HENKE,  
EVENSON & UHLMANN,  
By WILLARD E. SKEEL.

United States of America,  
State of Washington,  
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the de-

fendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 11th day of March, 1946.

[Seal]                      K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Copy received 3/14/46. Brethorst, Holman,  
Fowler & Dewar, Attys. for Defts. Macri.

Filed March 15, 1946.

---

[Title of District Court and Cause.]

REPLY AND ANSWER TO ANSWER AND  
CROSS-COMPLAINT OF THE CONTI-  
NENTAL CASUALTY COMPANY, ONE OF  
THE ABOVE NAMED DEFENDANTS

Come now Clyde Philp and A. J. Goerig, two of the above named defendants, and for reply and answer to the answer and cross-complaint of the Continental Casualty Company, one of the above named defendants, admit, deny and allege as follows:

## I.

For answer to the preamble and the first paragraph of said defendant Continental Casualty Company's cross-complaint these answering defendants deny each and every allegation therein contained or referred to and particularly deny that at any time material hereto these answering defendants were partners, co-partners or joint adventurers with Sam Macri, Joe Macri or Don Macri, or any of them, and that in any event the liability, if any, alleged in said cross-complaint arose subsequent to the termination of the relationship, if any, between these answering defendants and said defendants Sam Macri, Joe Macri or Don Macri, and that these answering defendants have no liability with respect thereto.

## 2.

For answer to paragraph 2 of said defendant Continental Casualty Company's cross-complaint these answering defendants not being advised as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

## 3.

For answer to paragraph 3 of said defendant Continental Casualty Company's cross-complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully replied to and answered the answer and cross-

complaint of the Continental Casualty Company, pray that said cross-complaint be dismissed with prejudice and that these answering defendants be given judgment against the Continental Casualty Company for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

Clyde Philp and

A. J. Goerig.

Filed March 15, 1946.

---

[Title of District Court and Cause.]

### ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Fred Velikanje appearing as attorney for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company.

It is stipulated that any party to this cause may offer in evidence any of the documents marked for



identification in cause #267 without objections as to signatures and authenticity of such document.

It is further stipulated that use plaintiff is entitled to judgment in the amount of \$4994.68 subject to judgment being appropriately fixed as to judgment debtors, and that all of the claim is on specification #1068 and subject also to the determination of whether or not the use plaintiff's claim for interest is valid.

It is further stipulated that there are no written agreement between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 251, 257 and 267

for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,  
United States District Judge.

Filed Jan. 27, 1947.

---

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled matter coming on regularly for trial in open court, plaintiff appearing by and through its attorneys, Velikanje & Velikanje; and the defendants Sam Macri, Joe Macri and Don Macri appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar; and defendants Clyde Philp and A. J. Goerig appearing by and through their attorneys, Brown & Hawkins; and the defendant Continental Casualty Company appearing by and through its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann; and the Court hearing evidence and being fully advised in the premises does now make the following

## Findings of Fact

## 1.

That at all times herein mentioned, the plaintiff, Union Concrete Pipe Co., Inc., is a Washington corporation duly licensed to do business in the State of Washington, and has paid all license fees due thereunder.

## 2.

That this action is brought in the name of the United States as plaintiff for the use of Union Concrete Pipe Co., Inc., under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at Large 793 and 794, Title 40, USCA Section 270 A, 270 B). Said plaintiffs at all times herein set forth has been and now is a citizen of the State of Washington.

## 3.

That at all times herein mentioned, the defendants Sam Macri, Joe Macri, Don Macri, were co-partners doing business as Macri & Company. That the defendants Clyde Philp and A. J. Goerig had been previously associated with said named Macris under a joint-venture agreement. That all of the last named defendants were and now are citizens of the State of Washington.

## 4.

That at all times herein mentioned, the defendant Continental Casualty Company was and now is a

corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such to carry on such surety business in the State of Washington. That said defendant, Continental Casualty Company, is a citizen of the State of Indiana.

5.

That on or about May 18th, 1944, the United States of America, through the Department of Interior and Macri & Company, made and entered into a certain contract being Contract No. 1068 of the Roza Division of the Yakima Project, Washington, being also known as Contract No. 12r-14996, wherein and whereby said Defendant contractors, Macri & Company, contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50.

6.

That on or about May 18th, 1944, to secure faithful performance of said contract and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said defendants, Macri & Company, as principals, and Continental Casualty Company, an Indiana Corporation, as surety, made, executed and delivered to the United States of America, as obligee, a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned that if the said defendants Macri & Company should

promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract above-described, the said bond should be void, but otherwise to remain in full force and effect. That upon the award of such contract to the defendants, Macri & Company, said bond became binding and ever since has remained in full force and effect.

7.

That the aforesaid contract No. 1068 was, and now is, a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to above, which said contract was performed and executed in Yakima County in the Eastern District of the State of Washington.

8.

That some time previous to the first day of January, 1945, the plaintiff, at the special instance and request of the Yakima Cement Products Co., a sub-contractor of defendants Macri & Company, agreed to deliver to Macri & Company certain concrete pipe. Subsequent thereto said plaintiff did deliver, and there was accepted by said Macri & Company between the date of January 26 and June 13, 1945, concrete pipe of the agreed and reasonable value of \$12,602.59. That said Macri & Company dealt directly with said plaintiff, so no written agreement or sub-contract was entered into between them. That



upon said price of \$12,602.59, defendants paid \$6,000.00 on the 21st day of April, 1945, and \$1,607.91 on June 6, 1945, said payments being made directly to said plaintiffs. That all deliveries were made directly to Macri & Company and were unloaded and delivered subject to the direction of Macri & Company and/or their agents.

9.

That within ninety days after the last material was furnished to said defendant Macri & Company, to-wit: On or about the 11th day of August, 1945, said plaintiff gave written notice to said defendant of the amount claimed and material furnished, said notice being served by mailing the same by registered mail, postage prepaid, in an envelope addressed to said defendants at their last known address, and a return card for which was received by said plaintiff.

10.

That more than ninety days had elapsed from the last work and materials furnished by plaintiff from the time of furnishing to the beginning of suit, and less than one year had elapsed since the complete performance and final settlement of contract, herein referred to as No. 1068, was made. The final settlement under said contract being made on or about October 15, 1945.

11.

That the ground upon which the jurisdiction of this Court is invoked is that the action arises under

the Act of Congress, referred to above, which expressly directs the bringing of the said action in this Court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the District in which said contract was to be and was performed and completed.

## 12.

That plaintiff had made demand upon Macri & Company for the payment of the unpaid balance of \$4,394.68, but said defendants Macri & Company had failed, neglected and refused to pay said amount, or any part thereof, or the interest thereon from June 13, 1945.

## 13.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above-referred to, and as part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above-named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things said application for bond contains the following words and phrases to-wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor

sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

#### 14.

That the relationship of joint adventurers or co-partners existing between the defendants Sam Macri, Joe Macri and Don Macri as first parties and Clyde Philp and A. J. Goerig as other parties were terminated prior to the incurring of the liability of the plaintiff herein.

The Court having heretofore made and entered its Findings of Fact does now make the following

#### Conclusions of Law

##### 1.

The use plaintiff, Union Concrete Pipe Co., Inc., a Washington corporation, is entitled to judgment in the amount of \$4,994.68, together with interest thereon at the rate of 6% per annum from June 13, 1945, until paid, together with its costs herein incurred, against the defendants, Sam Macri, Joe Macri, Don Macri, co-partners, doing business as Macri & Company, and Continental Casualty Company, an Indiana corporation.

##### 2.

The Continental Casualty Company, an Indiana corporation, is entitled to judgment on its cross-

complaint against the defendants, Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company in the amount of \$4,994.68, with interest thereon at the rate of 6% per annum from June 13, 1945, together with reasonable attorneys' fees in the amount of \$200.00, together with their costs and disbursements herein incurred.

## 3.

The defendants A. J. Goerig and Clyde Philp are entitled to a judgment of dismissal against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint against A. J. Goerig and Clyde Philp without costs.

## 4.

The defendants Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint against the Macris without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

VELIKANJE & VELIKANJE,

By E. F. VELIKANJE.

Filed May 1, 1947.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil No. 255

THE UNITED STATES OF AMERICA for the  
use of UNION CONCRETE PIPE CO., INC.,  
a Washington corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,  
CLYDE PHILP and A. J. GOERIG, co-part-  
ners and joint adventurers d/b/a Macri &  
Company, and CONTINENTAL CASUALTY  
COMPANY, an Indiana corporation,

Defendants.

### JUDGMENT AND DECREE

The above-entitled matter coming on for hearing in open court, the use plaintiff, Union Concrete Pipe Co., Inc., appearing by and through their attorneys, Velikanje & Velikanje, E. F. Velikanje of counsel; the defendants Sam Macri, Joe Macri and Don Macri appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar, Tom W. Holman of counsel; the defendants Clyde Philp and A. J. Goerig appearing by and through their attorneys Brown & Hawkins, Kenneth C. Hawkins of counsel; and defendant Continental Casualty Com-



pany appearing by and through its attorneys Skeel, McKelvy, Henke, Evenson and Uhlmann, Willard E. Skeel of counsel; and the Court hearing evidence and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law;

It Is, Now, Here Ordered, Adjudged and Decreed That the use plaintiff, Union Concrete Pipe Co., Inc., a Washington corporation, be and it is hereby granted judgment in the amount of Four Thousand Nine Hundred Ninety-four and 68/100 Dollars (\$4,994.68) together with interest at six per cent (6%) per annum from June 13, 1945, upon said amount, together with their costs and disbursements herein incurred taxed at \$35.25, against the defendants Sam Macri, Joe Macri and Don Macri, co-partners, doing business as Macri & Company, and against the Continental Casualty Company, an Indiana corporation; and use plaintiff's cause of action as against the defendants Clyde Philp and A. J. Goerig is dismissed without costs.

It Is Further Ordered, Adjudged and Decreed that the Continental Casualty Company, an Indiana Corporation, is entitled to judgment against the defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers doing business as Macri & Company in the amount of Four Thousand Nine Hundred Ninety-four and 68/100 Dollars (\$4,994.68), with interest thereon at the rate of six per cent (6%) per annum from June 13, 1945, together with rea-

sonable attorneys' fees in the amount of Two Hundred Dollars (\$200.00), together with their costs and disbursements herein incurred taxed at \$..... none.

It Is Further Ordered, Adjudged and Decreed that A. J. Goerig and Clyde Philip are granted a judgment of dismissal as against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint, without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri are granted a judgment of dismissal against the defendants A. J. Goerig and Clyde Philip on the latters' cross-complaint, without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

VELIKANJE & VELIKANJE,

By E. F. VELIKANJE.

Filed May 1, 1947.

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;
2. Misconduct of the prevailing party, his attorney or the jury;
3. Accident or surprise which ordinary prudence could not have guarded against;
4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
6. Insufficiency of the evidences to justify the verdict or decision;
7. Error in law occurring at the trial;
8. Where the right to procure a transcript

of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,  
KENNETH C. HAWKINS,  
Attorneys for Defendants  
A. J. Goerig and  
Clyde Philp.

Copy received this 12th of May, 1947.

VELIKANJE & VELIKANJE.

Filed May 12, 1947.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp, for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 20th day of May, 1947.

SAM M. DRIVER,  
Judge.

Presented by:

WILLARD E. SKEEL.

Filed May 20, 1947.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Mailed copies to: Velikanje & Velikanje, Miller Bldg., Yakima, Wash.; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,

Clerk.

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS A. J. GOERIG AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. The materials or labor furnished by the use plaintiff were furnished with respect to specification 1068, and the obligation which the bonding company was obligated to pay was therefore with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compensate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

3. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

4. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philip were its silent "partners."

5. The "silent" partnership was terminated prior to affixing of liability on the bond.

6. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

7. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS,  
NAT. U. BROWN,

Attorneys for Appellants

A. J. Goerig and  
Clyde Philp.

Filed July 30, 1947.

---

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Clyde Philp and A. J. Goerig, the Defendants above named, as Principal and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Penn-

sylvania, and legally doing business in the State of Washington as Surety are held and firmly bound unto Sam Macri, Joe Macri and Don Macri, d/b/a Macri & Company and the Continental Casualty Company, and the Union Concrete Pipe Co., Inc., in the just and full sum of Two Hundred Fifty Dollars (\$250.00) for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That,

Whereas, the above named Plaintiff, Union Concrete Pipe Co., Inc., on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., and Continental Casualty Company, above named, for \$4,994.68. Interest from June 13, 1945, and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp for said sums and an attorneys fee of \$200.00.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay Union Concrete Pipe Co., Inc., Sam Macri, Don Macri and Joe Macri, and the Continental Casualty Company, all costs and damages that may be awarded against

them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,

CLYDE PHILP,

[Seal]

MANUFACTURERS

CASUALTY INSURANCE

COMPANY,

By A. A. NAEF,

Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

---

[Title of District Court and Cause.]

United States of America,

Eastern District of Washington—ss.

### CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington do hereby certify the foregoing typewritten pages, numbered 1 to 56, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause, as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same now remains on file and



of record in my office and that the same constitutes the record on appeal of said Appellants from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this record on appeal is a copy of all exhibits designated by counsel for Appellants.

I further certify that "the memorandum decision of the Honorable Sam M. Driver dated March 27, 1947" as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record as called for in the designation of record on appeal of the Appellants amount to \$9.60 and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

---

[Endorsed]: No. 11724. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants., vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

[Adoption of Points on Appeal is set out on page 115 of companion cause No. 11722.]

[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint venture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—  
termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig and Philp.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee  
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.





No. 11725

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG AND CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY,  
a Corporation,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

NOV 23 1947

PAUL P. O'BRIEN,



No. 11725

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG and CLYDE PHILP,  
vs. Appellants,  
CONTINENTAL CASUALTY COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

---



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer .....	10
Answer and Cross-Complaint.....	14
Appeal:	
Notice of.....	36
Statement of Points on.....	37
Bond for Costs on.....	39
Bond for Costs on Appeal.....	39
Clerk's Certificate.....	40
Complaint .....	2
Findings of Fact and Conclusions of Law.....	21
Conclusions of Law.....	29
Findings of Fact.....	22
Judgment .....	31
Motion for New Trial.....	33
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	36
Order Denying Motion for New Trial.....	35
Order on Pre-Trial.....	19
Reply of A. J. Goerig and Clyde Philp to Answer and Cross-Complaint of Continental Casualty Company.....	18
Statement of Points on Appeal.....	37
Stipulation .....	43





NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

BROWN & HAWKINS,

Miller Building,  
Yakima, Washington,

Attorneys for A. J. Goerig and  
Clyde Philp, Defendants and Appellants.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

Insurance Building,  
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil No. 257

THE UNITED STATES OF AMERICA, for the  
use and benefit of YAKIMA CEMENT PROD-  
UCTS COMPANY, a corporation,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG, CLYDE PHILP, individuals and  
co-partners doing business as Macri & Com-  
pany, and CONTINENTAL CASUALTY  
COMPANY, a corporation,

Defendants.

## COMPLAINT

Comes now the plaintiff and for cause of action  
against the defendants, complains and alleges:

### 1.

This action is brought in the name of United States of America as plaintiff for the use and benefit of Yakima Cement Products Company, a corporation, hereafter referred to as the "use-plaintiff," under and by virtue of the authority granted by an act of Congress, approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at large 793, 794, 40 USCA 270 (a and b)).

## 2.

That the Yakima Cement Products Company, use-plaintiff herein, is a corporation organized and existing under the laws and statutes of the State of Washington having its principal place of business in Yakima, Washington. That all license fees due and owing to the State of Washington have been paid.

## 3.

That Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp are individuals and as to all matters herein mentioned were co-partners doing business under the assumed name of Macri & Company, and Macri Company. And that said individuals are residents of King County, State of Washington. That hereinafter, said defendants will be referred to collectively as Macri Company.

## 4.

That at all times herein mentioned, the defendant, Continental Casualty Company, was, and now is a corporation authorized to transact a general surety business in the State of Washington.

## 5.

That on or about December 7, 1943, the plaintiff, United States of America, and the defendant, Macri Company, entered into a contract in writing under the terms of which the defendant, Macri Company, agreed to construct earthwork, pipe lines and structures on laterals 59.3 to 69.8 and sublaterals under

schedule No. 1 of Specification No. 1062, Roza Division, Yakima Project, Washington, the same being Government Contract No. 12r-14825 wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$128,550.95. That said contract is hereafter referred to as Contract No. 1062.

## 6.

That on or about May 18, 1944, the plaintiff, United States of America, and the defendant, Macri Company, entered into a contract in writing under the terms of which the defendant, Macri Company, agreed to construct earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sub-lateral East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, the same being Government Contract No. 12r-14996, wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$169,667.50. That said contract is hereafter referred to as Contract No. 1068.

## 7.

That on or about the 7th day of December, 1943, to secure the prompt payment to all persons supply-



ing labor or materials employed or used in the prosecution of the work provided for in said Contract No. 1062, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America as obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

## 8.

That on or about the 18th day of May, 1944, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of work provided for in said Contract No. 1068, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America as obligee, a bond or undertaking as provided by law in the sum of \$84,833.75, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

## 9.

That the aforesaid contract was and now is a contract for the prosecution and completion of a

public work of the United States within the meaning of the act of Congress referred to above and said contract was performed and executed at or near Yakima, Yakima County, in the Eastern District of the State of Washington.

## 10.

That commencing on or about April 19, 1944, and continuing until on or about February 24, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1062 between the defendant, Macri Company, and the United States of America, certain materials for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of concrete pipe and other materials necessary in laying and joining said pipe. That the reasonable value and agreed price for said materials so furnished on said Contract No. 1062 was the sum of \$16,420.31.

## 11.

That commencing on or about December 4, 1944, and continuing until on or about August 18, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1068 between the defendant, Macri Company, and the United States of America, certain materials

for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of pipe and other materials necessary in laying and joining said pipe and in the construction of other structures under said contract, and that the reasonable value and agreed price for said materials so furnished on said contract No. 1068 was the sum of \$19,509.74.

## 12.

That said Macri Company made certain payments from time to time during the course of the delivery of said materials on Contracts Nos. 1062 and 1068, upon the purchase price thereof, an itemized statement of which said payments are as follows:

June 15, 1944 (cash) .....	\$ 1,619.64
September 16, 1944 (cash) .....	5,000.00
November 3, 1944 (cash).....	5,000.00
February 2, 1945 (credit for sales tax).....	6.15
February 19, 1945 (merchandise) .....	8.61
March 7, 1945 (cash) .....	2,000.00
April 3, 1945 (merchandise).....	98.00
April 21, 1945 (cash).....	10,000.00
June 30, 1945 (merchandise) .....	3.90
September 21, 1945 (merchandise) .....	62.40
September 26, 1945 (merchandise) .....	81.69
October 23, 1945 (merchandise).....	108.15
Total.....	<hr/> \$23,988.54

That the sums so paid by the defendant, Macri Company, were, by the use-plaintiff, applied first to the balance due upon the purchase price of the materials furnished for use under said Contract No. 1062, and that said payments were sufficient to cover the entire purchase price of those materials.

That the balance of said sums so paid, to-wit, the sum of \$7,568.23, has been applied by the use-plaintiff to the indebtedness incurred by the defendant upon the purchase price of the materials aforesaid for use under Contract No. 1068, leaving a balance due and owing upon said account in the sum of \$11,941.51. That though duly demanded no part of said \$11,941.51 has been paid.

## 13.

That as part of the agreement for the sale and delivery of said materials for use under said Contracts Nos. 1062 and 1068 by the use-plaintiff to the defendant, Macri Company, said defendant agreed to purchase such materials used upon terms as follows: "Net 30 days, interest at 6 per cent on past due accounts." That by virtue of said agreement and the failure of the said defendant to pay for said material upon such terms, interest has accumulated upon the purchase price of said pipe to the 23rd day of October, 1945, that being the date of the last entry in the account of said defendant for the materials mentioned above, in the sum of \$652.34; and that said interest is due and owing to the use-plaintiff in addition to the balance due on purchase price as hereinbefore mentioned.

## 14.

That all of the materials sold and delivered by the use-plaintiff to the defendant, Macri Company, were delivered to the said defendant at the site of construction mentioned in said contracts, or to said

defendant's trucks, and were all incorporated in and became a part of the materials supplied under said contracts by the defendant, Macri Company, to the United States of America. That said contracts were by their terms to be performed and executed in or near Yakima, Yakima County, in the Eastern District of Washington, and the same were in fact so performed and executed.

15.

That more than ninety days have elapsed since the last of said materials were furnished by the use-plaintiff and that less than one year has elapsed since the complete performance and final settlement of said contract No. 1062 was made. The final settlement and acceptance under said contract was made on March 31, 1945. That less than one year has elapsed since the complete performance and final settlement of Contract No. 1068 was made. The final settlement and acceptance under said contract was made on October 15, 1945.

Wherefore, the plaintiff, United States of America, prays for judgment for the use and benefit of the Yakima Cement Products Co., a corporation, against the defendants and each of them, individually and severally in the sum of \$12,593.85 together with interest thereon at 6 per cent per annum from October 23, 1945, until paid and together with plaintiff's costs and disbursements herein incurred and hereinafter to be taxed.

D. V. & LANE MORTLAND,  
Attorneys for Plaintiff.



State of Washington,  
County of Yakima—ss.

J. R. Sherman, being first duly sworn on oath deposes and says: That I am the Secretary-Treasurer of the Yakima Cement Products Company, a corporation, the use-Plaintiff named in and which makes the within and foregoing Complaint, and that I am authorized to verify same for and on behalf of said corporation; that I have read the foregoing Complaint, know the contents thereof, and that the same is true as I verily believe.

J. R. SHERMAN.

Subscribed and sworn to before me this 7th day of March, 1946.

[Seal]

LANE MORTHLAND

Notary Public in and for the State of Washington,  
residing at Yakima.

Filed March 9, 1946.

---

[Title of District Court and Cause.]

ANSWER

Come now the defendants Clyde Philp and A. J. Goerig and for answer to plaintiff's complaint admit, deny and allege as follows:

1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants not being in-

formed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 1.

2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation therein contained and particularly deny that A. J. Goerig and Clyde Philp, together with Sam Macri, Don Macri, and Joe Macri, were co-partners as to any of the matters therein mentioned and deny that they did business under the assumed name of Macri & Company and Macri Company. These answering defendants further allege that any relationship that may have existed between these answering defendants and the remaining above named defendants were terminated prior to the incurring of liability, if any, referred to and alleged in said complaint.

4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 4.

5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

10.

For answer to paragraph 10 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

11.

For answer to paragraph 11 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

12.

For answer to paragraph 12 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

13.

For answer to paragraph 13 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

14.

For answer to paragraph 14 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

15.

For answer to paragraph 15 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against Yakima Cement Products Company, a corporation, for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

A. J. Goerig and

Clyde Philp.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

D. V. MORTHLAND,  
LANE MORTHLAND,  
Attorneys for Plaintiff.

Filed May 17, 1946.

---

[Title of District Court and Cause.]

### ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

#### First Defense

##### I.

This answering defendant admits Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 15 of plaintiff's complaint.

##### II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs 10, 11, 13 and 14 and therefore denies said paragraphs and each and every part thereof, and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$11,941.51 or any other sum whatsoever or at all.

##### III.

In answer to Paragraph 12 of plaintiff's complaint, this answering defendant admits that pay-



ments were made but alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity as to the remainder of said paragraph or as to how or in what manner plaintiff applied the payments received and therefore denies said portions of Paragraph 12.

### Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

#### I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 15 of plaintiff's complaint.

#### II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

### III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Company, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney’s fees against each of the above named co-partners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff’s complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney’s fee to be fixed by said Court, against each of the above named indi-

vidual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY,  
EVENSON & UHLMANN,  
By WILLARD E. SKEEL.

United States of America,  
State of Washington,  
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 18th day of March, 1946.

[Seal] K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Copy received 3/19/46.

BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
Attys. for Defts. Macri.

Filed March 26, 1946.

[Title of District Court and Cause.]

REPLY OF A. J. GOERIG AND CLYDE PHILP  
TO ANSWER AND CROSS-COMPLAINT  
OF CONTINENTAL CASUALTY COM-  
PANY

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for reply to the answer and cross-complaint of Continental Casualty Company admit, deny and allege as follows, to-wit:

1.

For reply to paragraphs I, II and III of said defendant Continental Casualty Company's first defense these defendants A. J. Goerig and Clyde Philp deny each and every allegation therein contained.

2.

For reply to paragraphs I, II and III of said defendant Continental Casualty Company's cross-complaint these defendants A. J. Goerig and Clyde Philp deny each and every allegation therein contained.

Wherefore, having fully replied to the answer and cross-complaint of Continental Casualty Company, these defendants A. J. Goerig and Clyde Philp pray that said answer and cross-complaint be dismissed and that they go hence with their costs.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for A. J. Goerig  
and Clyde Philp.

Filed June 6, 1946.

[Title of District Court and Cause.]

## ORDER ON PRE-TRIAL

Pursuant to an oral order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Lane Morthland appearing as attorney for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for the defendants Maeri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company.

It is stipulated that the following exhibits may be marked for identification and received in evidence at the trial without objection as to authenticity of the documents and signatures.

Plaintiff's Identification "A"—Certified copy of contract and bond as to Specification #1062.

Plaintiff's Identification "B"—Certified copy of contract and bond as to Specification #1068.

Defendant Casualty Company's Identification "1"—Application for contract bond on Specification #1062.

Defendant Casualty Company's Identification "2"—Application for contract bond on Specification #1068.

Defendant Maeri Identification "1"—Joint venture agreement with Goerig and Philp on Specification #1062.



Defendants Macri Identification "2"—Joint venture agreement with Goerig and Philp on Specification #1068.

Defendants Goerig and Philp Identification "1"—Agreement terminating joint ventures.

It is further stipulated that the use plaintiff is entitled to judgment in the amount of \$11,941.51 subject to the surety showing distribution as to specifications #1062 and #1068, subject to judgment being appropriate fixed as to judgment debtors and to the determination of whether or not the use plaintiff's claim for interest (based upon a contract to pay interest or otherwise) is valid.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of

the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 251, 255 and 267 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

Filed Jan. 27, 1947.

---

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action coming on regularly for trial before the Court without a jury, plaintiff appearing personally and by its attorneys of record, D. V. and Lane Morthland, and the defendants, and each of them, appearing personally and by their respective attorneys of record herein, and evidence having been adduced and proof taken, and the Court having taken the matter under advisement and having on March 27, 1947, rendered a memorandum opinion herein and being fully advised in the premises, and in accordance with said memorandum opinion, the Court makes the following

## Findings of Fact

## 1.

This action is brought in the name of United States of America as plaintiff for the use and benefit of Yakima Cement Products Company, a corporation, hereafter referred to as the "use-plaintiff," under and by virtue of the authority granted by an act of Congress, approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at Large 793, 794, 40 USCA 270 (a) and (b)).

## 2.

That the Yakima Cement Products Company, use-plaintiff herein, is a corporation organized and existing under the laws and statutes of the State of Washington having its principal place of business in Yakima, Washington. That all license fees due and owing to the State of Washington have been paid.

## 3.

That at all times herein mentioned, the defendants Sam Macri, Joe Macri, Don Macri were co-partners doing business as Macri & Company. That the defendants Clyde Philp and A. J. Goerig had been previously associated with said named Macris under a joint-venture agreement. That all of the last named defendants were and now are citizens of the State of Washington.

## 4.

That at all times herein mentioned, the defendant Continental Casualty Company was and now is a

corporation authorized to transact a general surety business in the State of Washington.

## 5.

That on or about December 7, 1943, the plaintiff, United States of America, and the defendant, Maceri Company, entered into a contract in writing under the terms of which the defendant, Maceri Company, agreed to construct earthwork, pipe lines and structures on laterals 59.3 to 69.8 and sublaterals under Schedule No. 1 of Specification No. 1062, Roza Division, Yakima Project, Washington, the same being Government Contract No. 12r-14825 wherein and whereby said Maceri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$128,550.95. That said contract is hereafter referred to as Contract No. 1062.

## 6.

That on or about May 18, 1944, the plaintiff, United States of America, and the defendant, Maceri Company, entered into a contract in writing under the terms of which the defendant, Maceri Company, agreed to construct earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, the same being Gov-

ernment Contract No. 12r-14996, wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$169,667.50. That said contract is hereafter referred to as Contract No. 1068.

7.

That on or about the 7th day of December, 1943, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of the work provided for in said Contract No. 1062, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America as obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

8.

That on or about the 18th day of May, 1944, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of the work provided for in said Contract No. 1068, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the



United States of America as obligee, a bond or undertaking as provided by law in the sum of \$84,833.75, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns and has been at all times since said time and now is in full force and effect.

9.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the act of Congress referred to above and said contract was performed and executed at or near Yakima, Yakima County, in the Eastern District of the State of Washington.

10.

That commencing on or about April 19, 1944, and continuing until on or about February 24, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1062 between the defendant, Macri Company, and the United States of America, certain materials for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of concrete pipe and other materials necessary in laying and joining said pipe. That the reasonable value and agreed price for said

materials so furnished on said Contract No. 1062 was the sum of \$16,420.31.

11.

That commencing on or about December 4, 1944, and continuing until on or about August 18, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1063 between the defendant, Macri Company, and the United States of America, certain materials for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of pipe and other materials necessary in laying and joining said pipe and in the construction of other structures under said contract, and that the reasonable value and agreed price for said materials so furnished on said contract No. 1068 was the sum of \$19,509.74.

12.

That said Macri Company made certain payments from time to time during the course of the delivery of said materials on Contracts Nos. 1062 and 1068, upon the purchase price thereof, an itemized statement of which said payments are as follows:

June 15, 1944 (cash) .....	\$ 1,619.64
September 16, 1944 (cash) .....	5,000.00
November 3, 1944 (cash).....	5,000.00
February 2, 1945 (credit for sales tax).....	6.15
February 19, 1945 (merchandise) .....	8.61
March 7, 1945 (cash) .....	2,000.00
April 3, 1945 (merchandise).....	98.00
April 21, 1945 (cash).....	10,000.00
June 30, 1945 (merchandise) .....	3.90
September 21, 1945 (merchandise) .....	62.40
September 26, 1945 (merchandise .....	81.69
October 23, 1945 (merchandise).....	108.15
<hr/>	
Total.....	\$23,988.54

That the sums so paid by the defendant, Macri Company, were by the use-plaintiff, applied first to the balance due upon the purchase price of the materials furnished for use under said Contract 1062, and that said payments were sufficient to cover the entire purchase price of those materials. That the balance of said sums so paid, to-wit: the sum of \$7,568.23, has been applied by the use-plaintiff to the indebtedness incurred by the defendant upon the purchase price of the materials aforesaid for use under Contract No. 1068, leaving a balance due and owing upon said account in the sum of \$11,941.51. That though duly demanded no part of said \$11,941.51 has been paid.

13.

That all of the materials sold and delivered by the use-plaintiff to the defendant, Macri Company, were delivered to the said defendant at the site of construction mentioned in said contracts, or to said defendant's trucks, and were all incorporated in

and became a part of the materials supplied under said contracts by the defendant, Macri Company, to the United States of America. That said contracts were by their terms to be performed and executed in or near Yakima, Yakima County, in the Eastern District of Washington, and the same were in fact so performed and executed.

## 14.

That more than ninety days have elapsed since the last of said materials were furnished by the use-plaintiff and that less than one year has elapsed since the complete performance and final settlement of said Contract No. 1062 was made and this suit commenced. The final settlement and acceptance under said contract was made on March 31, 1945. That less than one year has elapsed since the complete performance and final settlement of Contract No. 1068 was made and this suit commenced. The final settlement and acceptance under said contract was made on October 15, 1945.

## 15.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above referred to, and as part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above-named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment

bond. That among other things said application for bond contains the following words and phrases to-wit:

“Second: To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever, and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

The Court having heretofore made and entered its Findings of Fact does now make the following

### Conclusions of Law

#### 1.

That the plaintiff is entitled to judgment against the defendants, Sam Macri, Don Macri and Joe Macri, co-partners, doing business as Macri and Company, and the defendant, Continental Casualty Company, an Indiana corporation, and each of them jointly and severally, in the sum of \$11,941.51 with interest thereon at the rate of six per cent (6%) per annum from October 23, 1945, until paid and together with plaintiff’s costs and disbursements herein incurred and hereafter to be taxed.

#### 2.

Continental Casualty Company, an Indiana corporation, is entitled to judgment upon its cross-



complaint against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company in the amount of \$11,941.51 with interest thereon at the rate of 6 per cent per annum from October 23, 1945, together with reasonable attorneys' fees in the amount of \$325.00 together with their costs and disbursements herein incurred.

## 3.

The defendants A. J. Goerig and Clyde Philp are entitled to a judgment of dismissal against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint against A. J. Goerig and Clyde Philp without costs.

## 4.

The defendants, Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint against the Macris without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By WILLARD E. SKEEL.

Filed May 1, 1947.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil No. 257

THE UNITED STATES OF AMERICA, for the  
use and benefit of YAKIMA CEMENT PROD-  
UCTS COMPANY, a corporation,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG, CLYDE PHILP, individuals and  
co-partners doing business as Macri & Com-  
pany, and CONTINENTAL CASUALTY  
COMPANY, a corporation,

Defendants.

### JUDGMENT

The above entitled action coming on regularly be-  
fore the Court for trial, plaintiff appearing person-  
ally and by its attorneys of record, D. V. and Lane  
Morthland, and defendants and each of them, ap-  
pearing in person and by their respective counsel  
of record herein, and evidence having been adduced  
and proof taken and the Court having made and  
entered its findings of fact and conclusions of law,  
and being fully advised in the premises and in ac-  
cordance with said findings of fact and conclusions  
of law,

It Is Hereby Ordered, Adjudged and Decreed; That the plaintiff be and it hereby is awarded judgment against the defendants Sam Macri, Don Macri and Joe Macri, co-partners, doing business as Macri and Company, and the defendant Continental Casualty Company, an Indiana corporation, jointly and severally in the amount of \$11,941.51, together with interest thereon at the rate of six per cent (6%) per annum from October 23, 1945, until paid and together with plaintiff's costs and disbursements herein incurred taxed at \$33.59.

It Is Further Ordered, Adjudged and Decreed that Continental Casualty Company, an Indiana corporation is hereby awarded judgment against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company in the amount of \$11,941.51 with interest thereon at the rate of six per cent per annum from October 23, 1945, together with a reasonable attorneys' fee in the amount of \$325, together with their costs and disbursements herein incurred taxed at \$. none.

It Is Further Ordered, Adjudged and Decreed that A. J. Goerig and Clyde Philp are granted a judgment of dismissal as against the defendants, Sam Macri, Joe Macri and Don Macri, on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri are granted a judgment of dismissal against

the defendants A. J. Goerig and Clyde Philp on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants, A. J. Goerig and Clyde Philp be and the same are hereby awarded judgment of dismissal against the beneficial plaintiff, Yakima Cement Products Company, a corporation, on its complaint against them without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,

EVENSON & UHLMANN.

By WILLARD E. SKEEL,

Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.

---

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or decision;

7. Error in law occurring at the trial;

8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the



Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,  
KENNETH C. HAWKINS,  
Attorneys for Defendants  
A. J. Goerig and  
Clyde Philp.

Copy received this 12th day of May, 1947.

D. V. & LANE MORTHLAND.

Filed May 12, 1947.

---

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp, for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist

or are well taken; and the Court being otherwise fully advised in the premises, it is

Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 20th day of May, 1947.

SAM M. DRIVER,

Judge.

Presented by:

WILLARD E. SKEEL.

Filed May 20, 1947.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Copies mailed to: D. V. and Lane Morthland, Miller Bldg., Yakima, Washington; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor, Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,

Clerk.

By MARIE EALY,

Deputy.

Filed July 29, 1947.

---

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. The materials or labor furnished by the use plaintiff, a reasonable value of which use plaintiff is suing for and was awarded judgment for were furnished with respect to specification 1068, and the obligation which the bonding company was obligated to pay herein was used with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compen-

sate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

3. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

4. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

5. The "silent" partnership was terminated prior to affixing of liability on the bond.

6. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

7. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Filed July 30, 1947.

[Title of District Court and Cause.]

## BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, A. J. Goerig and Clyde Philp, the Defendants above named, as Principal and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto Sam Macri, Don Macri, Joe Macri, d/b/a Macri and Company and Continental Casualty Company and Yakima Cement Products Company, a corporation, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such. That Whereas, the above named Plaintiff, Yakima Cement Products Company, a Corporation, on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., and Continental Casualty Company, above named, for \$11,941.51, and costs. Interest from October 23, 1945, and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said sums plus an attorney's fee in the sum of \$325.00.



And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig and Clyde Philp, shall pay Yakima Cement Products Company, Sam Macri, Don Macri, and Joe Macri, and the Continental Casualty Company all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,  
CLYDE PHILP.

[Seal]

MANUFACTURERS  
CASUALTY INSURANCE  
COMPANY.

By A. A. NAEF,  
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

---

[Title of District Court and Cause.]

United States of America,  
Eastern District of Washington—ss.

#### CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten

pages numbered 1 to 58, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause, as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office and that the same constitutes the record on appeal of said Appellants from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this record on appeal is a copy of all exhibits designated by counsel for Appellants.

I further certify that "the memorandum decision of the Honorable Sam M. Driver dated March 27, 1947" as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record as called for in the Designation of record on Appeal of the Appellants amount to \$9.80 and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand

and the seal of said District Court at Yakima, Washington, in said district this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

---

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

---

[Endorsed]: No. 11725. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

[Adoption of Points on Appeal is set out on page 115 of companion cause No. 11722.]

[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint venture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig and Philp.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee  
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.



No. 11726

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG AND CLYDE PHILP,  
Appellants,  
vs.  
CONTINENTAL CASUALTY COMPANY,  
a Corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

NOV 23 1947

W. R. GORIE



No. 11726

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

A. J. GOERIG and CLYDE PHILP,  
Appellants,  
vs.  
CONTINENTAL CASUALTY COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

---



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer and Cross-Complaint of A. J. Goerig and Clyde Philp.....	8
Answer and Cross-Complaint of Continental Casualty Company.....	11
Appeal:	
Notice of.....	33
Statement of Points on.....	34
Bond for Costs on.....	36
Bond for Costs on Appeal.....	36
Clerk's Certificate .....	38
Complaint .....	2
Findings of Fact and Conclusions of Law.....	19
Conclusions of Law.....	25
Findings of Fact.....	19
Judgment and Decree.....	27
Names and Addresses of Attorneys of Record..	1
Motion for New Trial.....	30
Notice of Appeal.....	33
Order Denying Motion for New Trial.....	32
Order on Pre-Trial.....	16
Reply to Answer and Cross-Complaint of the Continental Casualty Company.....	15
Statement of Points on Appeal.....	34
Stipulation .....	40





NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

BROWN & HAWKINS,

Miller Building,  
Yakima, Washington,

Attorneys for A. J. Goerig and  
Clyde Philp, Defendants and Appellants.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

Insurance Building,  
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

In the United States District Court, Eastern District of Washington, Southern Division

No. 267

UNITED STATES OF AMERICA, for the use  
and benefit of WALTON LUMBER COMPANY, a corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, and DON MACRI,  
doing business under the assumed trade name  
MACRI & COMPANY, and A. J. GOERIG  
and CLYDE PHILIP, and THE CONTINENTAL CASUALTY COMPANY, a corporation,

Defendants.

## COMPLAINT

Comes Now the above named plaintiff and for its cause of action alleges as follows:

### I.

That the Walton Lumber Company is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee due the State of Washington last past.

## II.

That Macri and Company at all times herein mentioned was and now is a co-partnership composed of Sam Macri, Joe Macri and Don Macri; that A. J. Goerig and Clyde Philip were at all times herein mentioned members of a joint adventure, consisting of themselves, and the members of the co-partnership of Macri and Company.

## III.

That the defendant, Continental Casualty Company, was at all times hereinafter mentioned and now is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana.

## IV.

That at the instance and request of the co-partnership of Macri and Company and the joint adventure consisting of the defendants above named in Paragraph II of this Complaint, the Walton Lumber Company delivered lumber to the said defendants as follows:

January 27, 1945, Invoice No. 1742, Specification No. 1062, Sunnyside.....	\$605.89
February 10, 1945, Invoice No. 1798, Specification No. 1062, Sunnyside.....	314.08
February 24, 1945, Invoice No. 1865, Prosser.....	557.65
February 24, 1945, Invoice No. 1865A, Prosser.....	33.30
February 10, 1945, Invoice No. 1799, Prosser.....	65.10
March 17, 1945, Invoice No. 1949, Prosser.....	259.22
March 26, 1945, Invoice No. 1981, Prosser.....	362.90
March 24, 1945, Invoice No. 1981A, Prosser .....	23.64
April 28, 1945, Invoice No. 2129, Prosser.....	558.63
May 5, 1945, Invoice No. 2160, Prosser.....	241.50

That said lumber delivered was of a reasonable value of \$3021.91;

That the said defendants have failed and refused to pay for said lumber delivered, and that there is due and owing to the plaintiff, Walton Lumber Company, the sum of \$3021.91.

## V.

That defendant, Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, entered into a contract, the exact date being unknown, with the United States Government for certain work to be done in connection with Schedule No. 1, Specification No. 1032, Roza Division, Yakima Project, Washington, and in connection with said work furnished to the United States Government a payment bond issued by the Continental Casualty Company in the sum of \$65,000.00; that at about the same date the said defendant did enter into a contract with the United States Government under Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, and did furnish a payment bond to the United States Government issued by the Continental Casualty Company in the sum of \$84,833.75; that the lumber furnished by the plaintiff, Walton Lumber Company, was furnished to the defendants in connection with both contracts jointly.

## VI.

That the Continental Casualty Company did, on the 7th day of December, 1943, issue a payment



bond in the sum of \$65,000.00, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided in a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule No. 1, Specifications No. 1062, Roza Division, Yakima Project, Washington.

## VII.

That the Continental Casualty Company did, on the 18th day of May, 1943, issue a payment bond in the sum of \$84,833.75, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided under a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington.

## VIII.

That more than ninety (90) days have elapsed since the plaintiff, Walton Lumber Company, furnished the material as set forth above and the defendants, a co-partnership and joint adventure, have failed to pay said obligation and the Conti-

nental Casualty Company is now liable on its bond for the payment of said material furnished in the sum of \$3021.91, said sum being due Walton Lumber Company.

### IX.

That A. J. Goerig and Clyde Philip were at all times herein mentioned interested in the contracts above described and were members of a joint adventure consisting of the members of the co-partnership and themselves.

### X.

That this action is brought under the provisions of the Miller Act (public Building Contracts) Aug. 24, 1935, c. 642, 49 Stat. 793, Code Title 40, Sections 270a-270d; that said Act provides that all actions instituted under the provisions thereof shall be brought in the name of the United States for the use of the person suing in the United States District Court, in the district in which the contract was executed and performed; that the contracts hereinabove sued upon were executed and performed under the jurisdiction of the above entitled court.

### XI.

That less than one year has elapsed since the date of final settlement upon the above described contracts, being Schedule No. 1, Specifications No. 1062, Roza Division, Yakima Project, Washington, and Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington.

Wherefore, plaintiff prays that it be granted judgment against the defendants, Sam Macri, Joe Macri and Don Macri, doing business under the assumed trade name, Macri and Company, and A. J. Goering and Clyde Philip, and The Continental Casualty Company, a corporation, in the sum of \$3021.91, together with interest as allowed by law from date of delivery, and that said judgment be declared a lien against the funds held by the Continental Casualty Company, or due and owing by the Continental Casualty Company to the United States Government, or to others, in connection with the operations above set forth in the Complaint, together with costs of suit and reasonable attorneys' fees and for such other and further relief as the Court may deem proper.

COOPER & COOPER,

By /s/ LESLIE R. COOPER,

Attorneys for Plaintiff.

State of Washington,  
County of Snohomish—ss.

J. H. Fletcher, being first duly sworn, on oath, deposes and says: That he is the Secretary of the Walton Lumber Company, a corporation, the plaintiff above named; that he is duly authorized to make this verification for and on behalf of said plaintiff; that he has read the above and foregoing Complaint, knows the contents thereof, and believes the same to be true.

/s/ J. H. FLETCHER.

Subscribed and Sworn to before me this 23rd day of April, 1946.

/s/ LESLIE R. COOPER,  
Notary Public, in and for the State of Washington,  
residing at Everett.

Filed April 24, 1946.

---

[Title of District Court and Cause.]

### ANSWER AND CROSS-COMPLAINT

Comes Now A. J. Goerig and Clyde Philp erroneously pleading herein as Clyde Philip, and for answer in and to the Plaintiff's Complaint admit, deny and allege as follows:

#### 1.

For answer to Paragraph One of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph One.

#### 2.

For answer to Paragraph Two of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Two.

#### 3.

For answer to Paragraph Three of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Three.

4.

For answer to Paragraph Four of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Four.

5.

For answer to Paragraph Five of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Five.

6.

For answer to Paragraph Six of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Six.

7.

For answer to Paragraph Seven of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Seven.

8.

For answer to Paragraph Eight of Plaintiff's complaint these answering defendants deny each and every allegation contained in said Paragraph Eight.

9.

For answer to Paragraph Nine of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Nine.



## 10.

For answer to Paragraph Ten of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Ten.

## 11.

For answer to Paragraph Eleven of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Eleven.

For a first and affirmative defense these answering Defendants allege.

## 1.

Any relationship existed between these answering Defendants and Sam Macri, Joe Macri and Don Macri has been terminated in by an agreement relieving these answering Defendants of any liability on the premises if any, which said agreement rests the entire responsibility for the matters contained in the Complaint upon Sam Macri, Joe Macri and Don Macri.

For Cross-Complaint against Defendants Sam Macri, Joe Macri and Don Macri, doing business under the assumed trade name Macri and Company, these answering Defendants alleges as follows:

## 1.

These answering Defendants and Sam Macri, Joe Macri and Don Macri entered into one certain agree-

ment whereby said Sam Macri, Joe Macri and Don Macri assumed all liability on account of all matters contained in said Complaint.

Wherefore, these answering Defendants pray that the Complaint be dismissed, and their costs and disbursements taxable by law; in the events that judgment be entered against these answering Defendants, these answering Defendants pray that they be given judgment over and against said Defendants.

BROWN & HAWKINS.

Filed May 14, 1946.

---

[Title of District Court and Cause.]

### ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

#### First Defense

##### I.

This answering defendant admits Paragraphs I, II, III, V, VI, VII, IX and X of plaintiff's complaint and further alleges that all acts and things done by the co-partnership Macri & Company, were also done by said co-partnership Macri & Company for and on behalf of their joint adventurers A. J. Goerig and Clyde Philp.

## II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs IV, VIII, and XI and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$3021.91 or any other sum whatsoever or at all.

## Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

## I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs I, II, III, V, VI, VII, IX and X of plaintiff's complaint.

## II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defend-

ants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorneys’ fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

### III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Company, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorneys’ fees against each of the above named co-partners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff’s complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of

use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN.

By WILLARD E. SKEEL.

United States of America,  
State of Washington,  
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 1st day of May, 1946.

[Seal] K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Filed May 8, 1946.



[Title of District Court and Cause.]

REPLY OF A. J. GOERIG AND CLYDE  
PHILIP TO ANSWER AND CROSS-COM-  
PLAINT OF THE CONTINENTAL CASU-  
ALTY COMPANY, A CORPORATION.

Comes Now the defendants A. J. Goerig and Clyde Philip and for reply to the Answer and Cross-Complaint of the defendants The Continental Casualty Company, admit, deny and alleges as follows:

1.

For reply to paragraphs I and II of said defendant The Continental Casualty Company, these replying defendants deny each and every allegation therein contained.

2.

For reply to paragraphs I, II and III of the cross-complaint of the defendant The Continental Casualty Company, these replying defendants deny each and every allegation therein contained.

Wherefore, having fully replied to the answer and cross-complaint of The Continental Casualty Company, these replying defendants A. J. Goerig and Clyde Philip pray that said cross-complaint be dismissed and held for naught and demand that judgment be entered in their favor for costs and disbursements taxable by law.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants

A. J. Goerig and

Clyde Philp.

Filed July 5, 1946.

[Title of District Court and Cause.]

### ORDER ON PRE-TRIAL

Pursuant to an oral order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Leslie R. Cooper appearing as attorney for plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company;

It is stipulated that the following exhibits may be marked for identification and received in evidence at the trial without objection as to authenticity of the documents and signatures.

Plaintiff's Identification "A"—Certified copy of contract and bond as to Specification #1062.

Plaintiff's Identification "B"—Certified copy of contract and bond as to Specification #1068.

Defendant Casualty Company's Identification "1"—Application for contract bond on Specification #1062.

Defendant Casualty Company's Identification "2"—Application for contract bond on Specification #1068.

Defendants Macri Identification "1"—Joint venture agreement with Goerig and Philp on Specification #1062.

Defendants Macri Identification "2"—Joint venture agreement with Goerig and Philp on Specification #1068.

Defendants Goerig and Philp Identification "1"—Agreement terminating joint ventures.

Motion of Mr. Cooper to amend his pleadings by adding a prayer for interest granted.

It is further stipulated between all parties involved in this cause, that a judgment may be entered for the use plaintiff, Walton Lumber Company, in the amount of \$3021.91, comprised of \$919.97 against specification #1062, and \$2101.94 against specification #1068, the entry of such judgment to be made after determination of the respective rights of the defendants Macri, the defendants Philp and Goerig, and the defendant Continental Casualty Company under the pleadings and the issues as now framed, and subject also to the determination of whether or not the use plaintiff's claim for interest is valid.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Cas-

ualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 251, 255 and 257 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

Filed Jan. 27, 1947.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the above entitled cause before Hon. Judge Sam M. Driver on the 19th day of February, 1947, Leslie R. Cooper appearing for the plaintiff, and Tom W. Holman appearing as attorney for defendants Sam Macri, Joe Macri and Don Macri, and Nat U. Brown appearing as attorney for defendants A. J. Goerig and Clyde Philp, and Willard E. Skeel appearing as attorney for defendant Continental Casualty Company, a corporation, and the Court having heard all the evidence adduced and arguments of counsel, now, therefore, makes the following:

### FINDINGS OF FACT

#### I.

That the Walton Lumber Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee due the State of Washington last past.

#### II.

That Sam Macri, Joe Macri and Don Macri were and now are a co-partnership doing business under the firm and style of Macri and Company, and all are residents of the City of Seattle in the Western District of Washington.



## III.

That A. J. Goerig and Clyde Philp had been members of a joint adventure consisting of themselves and the members of the co-partnership of Macri and Company.

## IV.

That the defendant Continental Casualty Company was at all times hereinafter mentioned and now is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana.

## V.

That at the special instance and request of the co-partnership of Macri and Company and the joint adventure consisting of Sam Macri, Joe Macri, Don Macri, A. J. Goerig and Clyde Philp, the Walton Lumber Company, a corporation, delivered lumber to the said defendants in connection with Schedule #1, Specification #1062 and #1068, Roza Division, Yakima Project, Washington:

January 27, 1945, Invoice #1742, Specification No. 1062, Sunnyside.....	\$605.89
February 10, 1945, Invoice #1798, Specification No. 1062, Sunnyside.....	314.08

Total deliveries of lumber under Specification #1062, date of last delivery February 10, 1945.....	
--	--

---

\$ 919.97

February 24, 1945, Invoice #1865, Specification No. 1068, Prosser.....	\$557.65
February 24, 1945, Invoice #1865A, Specification No. 1068, Prosser.....	33.30
February 10, 1945, Invoice #1799, Specification No. 1068, Prosser.....	65.10
March 17, 1945, Invoice #1949, Specification No. 1068, Prosser.....	259.22
March 26, 1945, Invoice #1981, Specification No. 1068, Prosser.....	362.90
March 24, 1945, Invoice #19181A, Specification No. 1068, Prosser.....	23.64
April 28, 1945, Invoice #2129, Specification No. 1068, Prosser.....	558.63
May 5, 1945, Invoice #2160, Specification No. 1068, Prosser.....	241.50
<hr/>	
Total deliveries of lumber under Specification #1068, date of last delivery May 5, 1945 .....	\$2,101.94

That the said defendants have failed and refused to pay for said lumber delivered and there is now due and owing to the plaintiff, Walton Lumber Company, a corporation, the sum of \$919.97 with respect to Specification #1062 and the sum of \$2101.94 with respect to Specification #1068.

## VI.

That the defendant Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, entered into a contract, the exact date being unknown, with the United States Government for certain work to be done in connection with Schedule #1, Specification No. 1062, Roza Division, Yakima Project, Washington, and in connection with said work furnished to the United States Gov-

ernment a payment bond issued by the Continental Casualty Company in the sum of \$64,275.48; that at about the same date the said defendant did enter into a contract with the United States Government under Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, and did furnish a payment bond to the United States Government issued by the Continental Casualty Company in the sum of \$84,833.75; that lumber as set forth in Paragraph V in the sum of \$2101.94 was furnished by the plaintiff, Walton Lumber Company, a corporation, in connection with Specification No. 1068, and lumber in the sum of \$919.97 was furnished in connection with Specification No. 1062.

## VII.

That the Continental Casualty Company did, on the 7th day of December, 1943, issue a payment bond in the sum of \$64,275.48, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided in a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule #1, Specifications #1062, Roza Division, Yakima Project, Washington.

## VIII.

That the Continental Casualty Company did, on the 18th day of May, 1945, issue a payment bond in

the sum of \$84,833.75, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided under a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule of Specifications #1068, Roza Division, Yakima Project, Washington.

### IX.

That more than ninety (90) days have elapsed since the plaintiff, Walton Lumber Company, a corporation, furnished said lumber as set forth in Paragraph V to the defendants and that they have failed to pay said obligation and that the Continental Casualty Company is now liable on its bonds for payment of said materials furnished as follows:

Bond in connection with Specification

#1062 ..... \$ 919.97

Bond in connection with Specification

#1068 ..... \$2101.94

### X.

That A. J. Goerig and Clyde Philp had been interested in the contracts above described and were members of a joint adventure consisting of the members of the co-partnership and themselves.

### XI.

That this action is brought under the provisions of the Miller Act (public Building Contracts) Aug.

24, 1935, c. 642, 49 Stat. 793, Code Title 40, Sections 270a-279d; that said Act provides that all actions instituted under the provisions thereof shall be brought in the name of the United States for the use of the person suing in the United States District Court, in the district in which the contract was executed and performed; that the contracts hereinabove sued upon were executed and performed under the jurisdiction of the above entitled court.

## XII.

That less than one year has elapsed since the date of final settlement upon the above described contracts, being Schedule #1, Specifications #1062, Roza Division, Yakima Project, Washington, and Schedule of Specifications #1068, Roza Division, Yakima Project, Washington.

## XIII.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above referred to, and as part of the consideration for the issuance thereof, defendants Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things said application for bond contains the following words and phrases, to-wit:



“Second. To indemnify the company against all loss, costs, damages, expenses and attorneys’ fees whatever, and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

From the Foregoing Findings of Fact, the Court now makes the following

## CONCLUSIONS OF LAW

### I.

That the Walton Lumber Company, a corporation, is entitled to judgment in the amount of \$3021.91, with interest thereon at the rate of 6% per annum on \$919.97 of said sum, from February 10, 1945, and with interest thereon at the rate of 6% per annum on \$2101.94 of said sum from May 5, 1945, against the defendants Sam Macri, Joe Macri and Don Macri, co-partners doing business as Macri and Company, and Continental Casualty Company, an Indiana corporation, together with costs and disbursements herein incurred.

### II.

Continental Casualty Company, an Indiana corporation, is entitled to judgment on its cross-complaint against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business

as Macri & Company, in the amount of \$3021.91 with interest thereon at the rate of 6 per cent per annum on \$919.97 of said sum from February 10, 1945, and with interest thereon at the rate of 6 per cent per annum on \$2101.94 of said sum from May 5, 1945, together with a reasonable attorney's fee in the amount of \$150 together with their costs and disbursements herein incurred.

### III.

The defendants A. J. Goerig and Clyde Philp are entitled to a judgment of dismissal against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint against A. J. Goerig and Clyde Philp without costs.

### IV.

The defendants Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint against the Macris without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN.

By WILLARD E. SKEEL,  
Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil Action No. 267

UNITED STATES OF AMERICA, for the use  
and benefit of WALTON LUMBER COM-  
PANY, a corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, and DON MACRI,  
doing business under the assumed trade name  
MACRI & COMPANY, and A. J. GOERIG  
and CLYDE PHILP, and THE CONTINEN-  
TAL CASUALTY COMPANY, a corporation,

Defendants.

### JUDGMENT AND DECREE

The above entitled matter coming on for hearing in open court, the use plaintiff, Walton Lumber Company, appearing by and through its attorney, Leslie R. Cooper; the defendants Sam Macri, Joe Macri and Don Macri appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar, Tom W. Holman of counsel; the defendants Clyde Philp and A. J. Goerig appearing by and through their attorneys Brown & Hawkins, Kenneth C. Hawkins of counsel, and the defendant Continental Casualty Company appearing by and through

its attorneys, Skeel, McKelvy, Henke, Evenson and Uhlmann, Willard E. Skeel of counsel; and the court hearing evidence and being fully advised in the premises and having heretofore entered its Findings of Fact and Conclusions of Law;

It Is, Now, Here Ordered, Adjudged and Decreed that the Walton Lumber Company, a corporation, is hereby granted judgment in the sum of \$3021.91, together with interest thereon at the rate of 6% per annum on \$919.97, of said sum from the 10th day of February, 1945, and with interest thereon at the rate of 6% per annum on \$2101.94 of said sum from the 5th day of May, 1945, against the defendants Sam Macri, Joe Macri and Don Macri, a co-partnership doing business as Macri and Company, and the Continental Casualty Company, an Indiana corporation, together with its costs and disbursements as herein incurred, taxed at \$33.59, and use plaintiffs cause of action as against the defendants Clyde Philp and A. J. Goerig is dismissed without costs.

It Is Further Ordered, Adjudged and Decreed that Continental Casualty Company, an Indiana corporation, is hereby granted judgment against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company, in the amount of \$3021.91 with interest thereon at the rate of 6 per cent per annum on \$919.97 of said sum from February 10, 1945, and with interest thereon at the rate of 6 per cent per annum on

\$2101.94 of said sum from May 5, 1945, together with a reasonable attorneys' fee in the amount of \$150.00 together with its costs and disbursements herein incurred, taxed at \$..... none.

It Is Further Ordered, Adjudged and Decreed that A. J. Goerig and Clyde Philp are granted a judgment of dismissal as against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint, without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri are granted a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint, without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By WILLARD E. SKEEL,

Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.



[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or decision;

7. Error in law occuring at the trial;

8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants

A. J. Goerig and

Clyde Philp.

Filed May 12, 1947.

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR NEW TRIAL**

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp, for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is

Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 20th day of May, 1947.

**SAM M. DRIVER,**  
Judge.

Presented by:

**WILLARD E. SKEEL.**

Filed May 20, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Copies mailed to: Cooper & Cooper, 210 Colby Bldg., Everett, Washington; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,

Clerk.

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. Use plaintiff was awarded judgment in the principal sum of \$919.97 with respect to materials furnished on specification 1062 and \$2101.94 for materials furnished with respect to 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compensate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. The materials furnished with respect to bond specification 1062 and 1068 were furnished and the obligation to pay for same arose subsequent to the termination agreement terminating the joint venture agreement.

3. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

4. The Continental Casualty Company did not



rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

5. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

6. The "silent" partnership was terminated prior to affixing of liability on the bond.

7. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

8. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS,  
NAT. U. BROWN,  
Attorneys for Appellants  
A. J. Goerig and  
Clyde Philp.

Filed July 30, 1947.

[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, A. J. Goerig & Clyde Philp, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto Sam Macri, Joe Macri & Don Macri, d/b/a Macri and Company, and the Continental Casualty Company & Walton Lumber Company, a corporation, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That, Whereas, the above named Plaintiff, Walton Lumber Company, a Corporation, on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., & The Continental Casualty Company, above named for \$3021.91 with interest at 6% on \$919.97 of said sum from 2/10/45 and interest at 6% on \$2101.94 from 5/5/45, and the Continental Casualty Company recovered Judgment over against A. J. Goerig and Clyde Philp in said sums plus an attorneys fee in the sum of \$150.00.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay Walton Lumber Company, a Corporation, and Sam Macri, Joe Macri and Don Macri and the Continental Casualty Company all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

[Seal]                    A. J. GOERIG,  
                             CLYDE PHILP,  
                             MANUFACTURERS  
                             CASUALTY INSURANCE  
                             COMPANY,  
By A. A. NAEF,  
                             Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

United States of America,  
Eastern District of Washington—ss.

### CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered 1 to 55, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause, as are necessary to the hearing of the appeal therein as called for by the designation of the record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office, and that the same constitutes the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this transcript of record on appeal is a copy of all exhibits designated by counsel for Appellants.

I further certify that the "memorandum decision of the Honorable Sam M. Driver dated March 27, 1947" as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the fore-

going typewritten record as called for in the Appellant's designation of record on appeal amount to \$9.50 and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

---

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

---

[Endorsed]: No. 11726. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



[Adoption of Points on Appeal is set forth on page 115 of companion cause No. 11722.]

---

[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint venture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig and Philp.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee  
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.



IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

---

A. J. GOERIG AND CLYDE PHILP,

*Appellants,*

vs.

CONTINENTAL CASUALTY COMPANY,

*A Corporation Appellee,*

A. J. GOERIG AND CLYDE PHILP,

*Appellants.*

vs.

CONTINENTAL CASUALTY COMPANY, A CORPORATION,  
AND J. W. MORRISON, AN INDIVIDUAL, DOING BUSINESS AS J. W. MORRISON COMPANY,

*Appellees.*

---

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

---

HONORABLE SAM M. DRIVER, *Judge*

---

BRIEF FOR THE APPELLANTS

---

BROWN & HAWKINS,  
FERGUSON, BURDELL & ARMSTRONG,  
*Attorneys for Appellants*

Office and Post Office Address:  
1012 Northern Life Tower,  
Seattle 1, Washington.





IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

---

A. J. GOERIG AND CLYDE PHILP,  
*Appellants,*  
vs.

CONTINENTAL CASUALTY COMPANY,  
*A Corporation Appellee,*

A. J. GOERIG AND CLYDE PHILP,  
*Appellants.*  
vs.

CONTINENTAL CASUALTY COMPANY, A CORPORATION,  
AND J. W. MORRISON, AN INDIVIDUAL, DOING BUSINESS AS J. W. MORRISON COMPANY,  
*Appellees.*

---

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

---

HONORABLE SAM M. DRIVER, *Judge*

---

**BRIEF FOR THE APPELLANTS**

---

BROWN & HAWKINS,  
FERGUSON, BURDELL & ARMSTRONG,  
*Attorneys for Appellants*

Office and Post Office Address:  
1012 Northern Life Tower,  
Seattle 1, Washington.

---

# INDEX

	<i>Page</i>
1. Jurisdictional Statement .....	1
2. The Parties.....	2
3. Case No. 11726.....	5
A. Factual Statement .....	5
B. The Judgment of the Lower Court.....	10
C. Specification of Errors Relied Upon..	11
D. Summary of Argument.....	12
E. Argument .....	14
F. Conclusion .....	28
4. Case No. 11725.....	28
A. Factual Statement .....	28
B. The Judgment of the Lower Court.....	30
C. Specification of Errors Relied Upon..	31
D. Summary of Argument.....	33
E. Argument .....	34
F. Conclusion .....	37
5. Case No. 11724.....	37
A. Factual Statement.....	37
B. The Judgment of the Lower Court.....	38
C. Specification of Errors Relied Upon..	39
D. Summary of Argument.....	40
E. Argument .....	41
F. Conclusion .....	42
6. Case No. 11722.....	43
A. Factual Statement.....	43
B. The Judgment of the Lower Court....	44
C. Specification of Errors Relied Upon..	44
D. Summary of Argument.....	45
E. Argument .....	45
F. Conclusion .....	45
7. Case No. 11723.....	45
A. Factual Statement.....	45
B. The Judgment of the Lower Court.....	46
C. Specification of Errors Relied Upon..	47
D. Summary of Argument.....	48
E. Argument .....	49
F. Conclusion .....	51

## TABLE OF CASES

	Page
<i>American Surety Co. v. Singer Sewing Machine Co.,</i> (D. C. S. D. N. Y. 1937) 18 Fed Supp. 750.....	24
<i>Buell v. Hall</i> , 169 Okla. 394, 37 P. 2d 308.....	24
<i>Collyer v. Egbert</i> , 200 Wash. 342, 93 P. 2d 399.....	20
<i>Fidelity &amp; Casualty Co. v. Minneapolis Brewing Company,</i> 214 Minn. 436 8. N. W. 2d 471.....	25
<i>Huston v. Wash. Wood &amp; Coal Co.,</i> 4 W. 2d 449, 103 P. 2d 1095.....	28
<i>Jones v. Davis</i> , 153 Wash. 186, 279 Pac. 405.....	18
<i>Lowenstein v. Whitelaw</i> , 178 Wash. 428 34 P. 2d 1108.....	18
<i>Paulson v. McMillan</i> , 8 W. 2d 295, 11 P 2d 983.....	18
<i>Ridder v. Blethen</i> , 24 W. 2d 552, 166 P. 2d 834.....	27
<i>Seattle v. Ericksen</i> , 99 Wash. 543, 169 Pac. 985.....	22
<i>Seattle v. North. Pac. R. Co.</i> , 47 Wash. 552, 92 Pac. 411.....	23
<i>Seattle v. North. Pac. R. Co.</i> , 63 Wash. 129, 114 Pac. 1038.....	23
<i>Southern Surety Co. v. Plott</i> , (C. C. A. 4, 1928) 28 F. 2d 698.....	15
<i>Town of Flagstaff v. Walsh</i> , (C. C. A. 9, 1925) 9 F. 2d 590.....	23
<i>U. S. v. Ames</i> , 99 U. S. 35, L. Ed. 295.....	16
<i>Waterman v. Alden</i> , 143 U. S. 196, 12 S. Ct. 435, 36 L. Ed. 123....	16

## TEXT BOOKS

	<i>Page</i>
53 A. L. R. 178.....	28
40 Am. Jur. p. 260, Sec. 188.....	20
40 Am. Jur. p. 309, Sec. 259 .....	20
50 Am. Jur. p. 1092, Sec. 284.....	26
12 Am. Jur. p. 843, Sec. 290.....	27
47 Corpus Juris, p. 985, 1035, 1137.....	20
42 C. J. S. p. 619 (Sect. 32b).....	25

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

---

A. J. GOERIG AND CLYDE PHILP,

*Appellants,*

vs.

CONTINENTAL CASUALTY COMPANY,

*A Corporation Appellee,*

A. J. GOERIG AND CLYDE PHILP,

*Appellants.*

vs.

CONTINENTAL CASUALTY COMPANY, A CORPORATION,  
AND J. W. MORRISON, AN INDIVIDUAL, DOING BUSINESS AS J. W. MORRISON COMPANY,

*Appellees.*

---

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

---

HONORABLE SAM M. DRIVER, *Judge*

---

**BRIEF FOR THE APPELLANTS**

---

**Jurisdictional Statement**

These are appeals from five cases which were tried in the District Court of the United States for the Eastern District of Washington, Southern Division. Each of these cases was a suit under the Miller Act (49 Stat. 793 et seq.; 40 U.S.C.A. 270a,



270b), which provides that one who has furnished labor or material upon any Federal construction project, and who has not been paid by the principal contractor, may institute suit in the name of the United States for the amount due, regardless of the amount in controversy.

The Miller Act further provides that all principal contractors engaged in Federal work must furnish a payment bond for the protection of persons supplying labor and material in connection with such work.

In accordance with the foregoing terms of the Act, the nominal plaintiff in each of these five cases was the United States; but each case was instituted and prosecuted for the use and benefit of a particular subcontractor (hereinafter referred to as a "use plaintiff") who furnished labor and materials in connection with a Bureau of Reclamation irrigation project in Yakima and Benton Counties, in the State of Washington.

These appeals are being taken pursuant to the provisions of 28 U.S.C.A. 225 (26 Stat. 828, as amended).

### **The Parties**

Not all of the parties named in the various complaints and cross-complaints which were filed in the Court below are parties to this appeal. We feel, however, that proper consideration of the points involved in this appeal requires a complete description

of the various parties who were involved in the lower court proceedings.

The use plaintiffs in the five cases now before the Court were supply companies or subcontractors who furnished labor and materials in the construction of the aforesaid irrigation project. Their complaints alleged failure to pay for labor and materials which had been furnished by them for use in the construction work.

One group of defendants consisted of certain partners doing business under the name Macri & Co. (sometimes referred to in the record as "Macri & Company" or "Macri Company."). The individuals who composed this partnership were Sam Macri, Joe Macri and Don Macri, hereinafter referred to as "the Macri partners" (Tr. 40). This partnership, on December 7, 1943, entered into a contract with the United States Bureau of Reclamation for the construction of a portion of the aforesaid irrigation project. Pursuant to the provisions of the Miller Act, as aforesaid, the partnership furnished a payment bond for the protection of persons furnishing labor and material in connection with this work. On May 18, 1944, the Macri partners entered into a second contract with the Bureau of Reclamation for the construction of an additional portion of the same project. A payment bond was also executed with respect to this contract.

In each of the several complaints it was charged

that the respective use plaintiff had furnished labor and materials to the Macri partners in connection with the carrying out of the above contracts, for which payment had not been made.

Additional defendants in the lower Court were the Appellants Clyde Philp and A. J. Goerig, a partnership doing business under the name of Goerig & Philip. These individuals were made defendants by virtue of the fact that during part of the period involved they had been engaged in a joint venture agreement with Macri & Co.

The remaining defendant was the Appellee Continental Casualty Company, an Indiana corporation (hereinafter referred to as "Continental"). This company, upon the application of the Macri partners, furnished the payment bonds required by the Miller Act, guaranteeing payment for the materials and labor furnished by the several use plaintiffs. Two of such bonds were furnished, each relating to one of the two contracts referred to above. Each of such bonds contained an indemnity clause providing that the principal on the bond would indemnify the surety for all costs and expenses incurred by the latter by reason of its surety commitments thereupon.

In each of the five cases Continental filed a cross-complaint against the Macri partners and against Goerig and Philp on the basis of the aforesaid indemnity provisions.

Certain other cross complaints were filed in the lower Court which are not material to this appeal and which, therefore, do not require discussion.

The Appellants herein, in all five cases, are Clyde Philp and A. J. Goerig. The Appellee, in all cases, is the surety, Continental Casualty Company. In one case, namely No. 11723, the use plaintiff is also made an Appellee.

Since the facts involved in the several appeals now before the Court differ somewhat, we deem it preferable to discuss each case separately. Case No. 11726 involves problems which are common to all of the other cases and for that reason will be discussed first herein. In discussing the remainder of the cases we will, for the purpose of brevity, refer from time to time to the applicable arguments made in Case No. 11726.

## **Case No. 11726**

### **A. Factual Statement:**

Case No. 11726 involves both the contract of December 7, 1943, and the contract of May 18, 1944. That is to say, part of the materials and labor furnished by the use plaintiff in this case were furnished in connection with the December 7 contract and part were furnished in connection with the May 18 contract.



(1) *Facts Relating to Contract of December 7, 1943.*

The contract of December 7, 1943 provided for the construction of a portion of the irrigation project which was referred to as Specification No. 1062. The contracting parties were the Bureau of Reclamation on the one hand and Macri & Co. on the other. It was specifically recited in the contract that Macri & Co. was a partnership consisting of Sam Macri, Don Macri and Joe Macri (Tr. 58-59).\*

In connection with this contract, the Appellee, Continental Casualty Company, furnished a payment bond which guaranteed payment to all persons furnishing labor and materials, and which contained a clause providing that the principal on the bond would indemnify the surety for any payment which the latter might be required to make by reason of the defalcation of the principal. The application for this payment bond was made by Sam Macri, on behalf of the Macri Company. No other person signed the application (Tr. 79). In the body of the application there was a recitation to the effect that the full name of the applicant was the Macri Company (Tr. 67).

The bond itself was signed by Sam Macri, Don Macri and Joe Macri, each of the signatories designating himself as an individual principal. In

---

\*All of the evidence which was introduced in the Trial Court is included in the transcript of Case No. 11722. Unless otherwise indicated, all transcript references herein refer to the transcript of that case. References to the transcripts of other cases will include both the case number and the transcript page thereof.



addition the bond expressly recited that the principals thereupon consisted of Sam Macri, Don Macri, and Joe Macri, who were designated as the partners in the firm of Macri & Company (Tr. 60-61).

Neither the contract nor the bond application or bond was signed by either Goerig or Philp, and at no place in any of these instruments is there to be found any indication or representation that any connection or relationship existed between the Macri partnership and these appellants.

On December 11, four days after the execution of the contract relating to Specification No. 1062, a joint venture agreement was entered into between the Appellants herein and the Macri partners. This joint venture agreement provided that the signatories would jointly perform the work called for under Specification No. 1062 and would share in the profits derived from such work. The agreement further provided that "as between the parties" the payment bond was to be considered as having been executed pursuant to the joint venture agreement (Tr. 92).

The above joint venture agreement was terminated by mutual consent of the parties thereto on July 15, 1944 (Tr. 108). This termination took place prior to the furnishing of any labor and materials by the use plaintiff in connection with the December 7 contract (Tr. 11726-20).

(2) *Facts Relating to Contract of May 18, 1944*

A second contract, relating to the portion of the work designated as Specification No. 1068, was entered into on May 18, 1944. The parties thereto were the Bureau of Reclamation on the one hand and the Macri partners on the other. The contract recited that Macri & Co. was a partnership consisting of Sam Macri, Don Macri and Joe Macri. (Tr. 62-63).

The Appellee, Continental Casualty Company, also furnished a payment bond with respect to the May 18 contract, similar in its provisions to the bond which was furnished in connection with the December 7 contract. The application for this bond was signed by Joe Macri on behalf of Macri & Co. (Tr. 72); and the application recited that the full name of the applicant was Macri & Co., which was described as being a partnership composed of Sam Macri, Don Macri and Joe Macri. (Tr. 80).

The bond which was furnished pursuant to the aforesaid application was signed by Sam Macri, who was described as being a "member of the firm" of the Macri Company (Tr. 63); and the bond expressly recited that the principals thereupon were Sam Macri, Don Macri and Joe Macri, who were designated as the partners in the firm of Macri & Co. (Tr. 64-65).

Appellants and the Macri partners also entered into a joint venture agreement which purported to relate to Specification No. 1068 (Tr. 100), which

was the portion of the work covered by the contract of May 18, 1944. This joint venture agreement was executed on the same date as the joint venture agreement covering the contract of December 7, 1943—that is, on December 11, 1943. The second joint venture agreement contained provisions similar to the first, with respect to the sharing of profits. It also contained a provision to the effect that “as between the partners” any bond relating to Specification No. 1068 should be considered as having been executed pursuant to the joint venture.

The second joint venture agreement, like the first, was terminated by mutual consent of the parties on July 15, 1944 (Tr. 108), prior to the furnishing of labor and materials by the use plaintiff (Tr. 11726-20).

### (3) *Summary of Significant Dates*

By way of summarization the significant dates are set forth in the following table:

#### *Contract Relating to Specification No. 1062*

December 7, 1943—Date of principal contract between Macri Bros. and Bureau of Reclamation.

December 7, 1943—Date of bond application and bond—Macri partners as principals and Continental Casualty Company as surety.

December 11, 1943—Date of joint venture agreement.

July 15, 1944—Date of termination of joint venture agreement.

January 27, 1945 to May 5, 1945—Period of furnishing labor and materials by use plaintiff.

*Contract Relating to Specification No. 1068*

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri & Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

January 27, 1945 to May 5, 1945—Period of furnishing labor and materials by use plaintiff.

## **B. The Judgment of the Lower Court:**

In the instant case (11726) the lower Court entered judgment in favor of the use plaintiff and against the Macri partners, both with respect to the matters involved in the contract of December 7, 1943, and those involved in the contract of May 18, 1944. It was held, however, that the use plaintiff was not entitled to judgment as against Appellants Goerig & Philp (Tr. 11726—27-29).

Despite the fact that no recovery was allowed the use plaintiff as against Appellants Goerig & Philp, the Appellee, Continental Casualty Company, was awarded judgment on its cross-complaint not only as against the Macri partners but also as against the Appellants. The amount of this judgment, with respect to the contract of December 7, 1943 (Specification No. 1062), was \$919.97, and with respect



to the contract of May 18, 1944 (Specification No. 1068), was \$2,101.94. (Tr. 11726-27-29).

### **C. Specification of Errors Relied Upon:**

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the joint venture agreement between Appellants and the Macri partners was terminated prior to the time any labor and materials were furnished by the use plaintiff.

3. The Court erred in entering judgment against Appellants and in favor of Continental in connection with the contract of December 7, 1943, for the reason that the joint venture agreement was entered into after the payment and indemnity bond had been furnished by Continental. Accordingly, Appellants were not parties to any contract of indemnity; and assuming that the joint venture agreement was a contract for the benefit of Continental, then Continental nevertheless has no right to recover thereupon because the joint venture



agreement was terminated prior to any acceptance or act in reliance thereupon by Continental.

4. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants were held to be not liable to the use plaintiff for the materials and labor furnished by him; and, accordingly, Appellants may not be held liable to Continental because an indemnitor may not be held liable to his indemnitee where the acts of the former did not cause payment by the latter under the surety clause.

The foregoing specifications are included in the statement of points on appeal which is set forth at page 34 of the Transcript of Record in case No. 11726.

#### **D. Summary of Argument:**

(1) With respect to both the December 7, 1943, and the May 18, 1944, contracts the bonds were furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit

or performance of the person who applies for the bond and may look only to him for indemnity.

(2) Appellants terminated their joint venture agreements with the Macri partners prior to the furnishing of labor and materials by the use plaintiff, either with respect to the December 7, 1943 contract, or the May 18, 1944 contract. A partner is not liable for the acts of his former partners which take place subsequent to the dissolution of the partnership. Since the relationship between Appellants and the Macri partners was secret, and the Appellants were merely dormant partners, it was not necessary for them to give notice of the termination or dissolution of the joint venture agreement. Accordingly, the lower Court correctly held that there was no liability in favor of the use plaintiff and against Appellants. It follows that Continental has no right of action over against these Appellants, for it is well settled that a judgment of dismissal against an indemnitor precludes the surety from recovering over against him.

(3) With respect to the contract of December 7, 1943, the joint venture agreement between Appellants and the Macri partners was not entered into until after the execution of the contract and after the execution of the bond application and bond which related to that contract. There was, therefore, no privity of contract between Appellants and Continental, and there was no evidence of any

basis of estoppel against Appellants. At most, the joint venture agreement was a contract for the benefit of Continental which was rescinded prior to any acceptance or act by Continental in reliance thereupon. It is well settled that under such circumstances the third party beneficiary has no right of recovery.

### **E. Argument:**

(1) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT APPELLANTS WERE NOT PARTIES TO THE INDEMNITY CONTRACT UPON WHICH APPELLEE'S ACTION IS BASED.

We submit that the lower Court erred upon several grounds in awarding judgment in favor of Continental and against Appellants Goerig and Philp. One primary basis which requires reversal consists of the fact that the Appellants were not parties either to the bond or the bond application upon which Continental must rely to sustain its action for indemnity. It is true that in connection with the contract of May 18, 1944, the joint venture agreement between Appellants and the Macri partners was in existence at the time of the execution of the bond application and bond. However, the bond was issued by Continental solely upon the personal application of the Macri partners. Appellants did not appear upon the bond application and they committed no act which might be claimed to have caused Continental to rely upon their security.

We may concede that in an ordinary partnership arrangement one partner is liable upon contracts entered into by another partner. This is not true, however, with respect to indemnity contracts. It has been held that a surety relies solely upon the security of the one who executes the bond application and bond, and must look only thereto for indemnity. This rule has been applied, even in cases where the person who executes the bond application is acting as agent for others. A case in point is *Southern Surety Co. v. Plott*, (CCA 4, 1928), 28 F. 2d 698. In that case it appeared that certain partners had entered into a contract with the State of North Carolina for the construction of a road. One of the partners, namely Plott, obtained a bond from the plaintiff on his personal application. The bond guaranteed performance of the contract and contained a clause providing for the indemnity of the bonding company in the event of being required to make payment. The partners abandoned the contract after construction had been commenced and the plaintiff was required to complete the work in accordance with the contract. The plaintiff thereupon sued all of the partners on the indemnity provision, alleging that Plott had obtained the bond as agent for the partnership. The Court held that the plaintiff had no right of recovery against the partners other than Plott, declaring (p. 698):

“The principle that a surety can look only to



the principal who signs the bond is supported by numerous decisions."

The Court thereupon discussed numerous decisions which supported its decision and quoted from numerous text authorities, including, for example, the following quotation from *Childs on Suretyship* (p. 699):

"The mere fact that a principal is jointly liable with others for the debt will not give a surety any right against such others, if they are not actual parties to the contract."

Discussing the materiality of the knowledge of the bonding company of the existence of the partnership, the Court in the above case, quoting from an early decision of the United States Supreme Court, declared (p. 700):

"If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal."

See also *U. S. v. Ames*, 99 U. S. 35, 25 L. Ed. 295, and *Waterman v. Alden*, 143 U. S. 196, 12 S. Ct. 435, 36 L. Ed. 123.

The rule announced above is applicable both to the contract of Dec. 7, 1943, and that of May 18, 1944, for in neither case were Appellants parties to the bond or bond application. Accordingly, upon this ground, as well as upon the several additional grounds discussed below, the judgment in case No. 11726 must be reversed.



(2) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE JOINT VENTURE AGREEMENT HAD BEEN TERMINATED AND DISSOLVED PRIOR TO THE TIME OF FURNISHING LABOR AND MATERIALS TO USE PLAINTIFF.

A second reason which requires reversal of the judgment of the lower Court is the fact that Appellants, by termination of the joint venture agreements, had withdrawn from any relationship with the Macri partners prior to the time the latter had been furnished any labor and materials by the use plaintiff in this case. Because of this fact the Court dismissed the action of the use plaintiff against Appellants. The reason for the Court's decision in this regard was the fact that the joint venture agreement between the Macri partners and Goerig and Philp had been terminated prior to the time the use plaintiff delivered labor and materials either in connection with contract No. 1062 or contract No. 1068.

Despite the fact that the Court held that Appellants were not liable to the use plaintiff for the furnishing of such labor and materials, it was held that when Continental became liable to pay for such labor and materials on the basis of the payment bond, it was thereupon entitled to maintain an action over against Appellants to recover the amount of such payment. A judgment against Appellants was entered upon this theory. We submit that such

judgment, being wholly inconsistent, is clearly erroneous.

(a) *The lower Court was correct in dismissing the action of use plaintiff against Goerig and Philp.*

Clearly the dismissal of the original action as against Appellants was correct. The relationship of parties to a joint venture agreement is so similar to that of partners that the duties and liabilities are generally tested by the same rules in each case. *Paulson v. McMillan*, 8 W. 2d 295, 111 P. 2d 983. Accordingly, since no partnership or joint venture relationship existed at the time of the dealings between the use plaintiff and the Macri partners there was no ground for recovery against Appellants Goerig and Philp, in the absence of some basis of estoppel. As said in *Lowenstein v. Whitelaw*, 178 Wash. 428, 34 P. 2d 1108 (p. 1109):

“One is liable to third persons as a partner only when a partnership actually exists, or when, by his conduct, he is estopped from denying it.”

Similarly, in the absence of an estoppel, a retiring partner is not liable for goods sold to his associate after dissolution of the partnership. *Jones v. Davis*, 153 Wash. 186, 279 Pac. 405. It is true, of course, that where a third party extends credit to a partnership the individual partners may not divest themselves of liability simply by withdrawing from the partnership. In such case notice of the dissolution of the partnership must generally

be given. In the case at bar, however, a somewhat different rule is involved because of the fact that the Appellants Goerig and Philp were dormant or silent partners. This was true not only in case No. 11726 but also in the remaining four cases now before the Court. The record clearly demonstrates that the fact of the joint venture relationship between Appellants and the Macri partners was not made known to any of the use plaintiffs or to the bonding company or to any other party or parties concerned in the project. The contracts, bond applications and bonds were all signed by the Macri partners, without disclosure of the fact that a joint venture arrangement with Goerig & Philp was in existence or contemplated. During the period involved in these cases Appellants Goerig and Philp maintained an office in Seattle, Washington, some distance from the office of the Macri partners. All of the work in connection with the project was carried out by the Macri partners (Tr. 106). Neither Goerig nor Philp ordered or requested any labor or materials to be furnished for use upon the project (Tr. 26-29). Moreover, there is no evidence whatsoever in the record to the effect that either Goerig or Philp ever performed any act indicative of a partnership or joint venture arrangement prior to the time of its termination.

It should also be observed that even if we assume that Appellants were parties to the bond of May 8,

1944, by reason of the joint venture agreement which then existed, then their participation upon such bond was purely that of dormant partners. As such, as is demonstrated by the principles discussed below, they could terminate their relationship with the Macri partners before the accrual of liability without the necessity of notice of such termination.

The law is well established that where, as in the case now before the Court, a partnership includes a dormant partner, the latter may divest himself of liability for further debts of his associates simply by terminating the partnership. It is not necessary to give notice of dissolution in such case. In this connection, it is stated in 40 Am. Jur. p. 260 (Sect. 188) that a dormant partner

“ . . . is not liable to persons not knowing him to be a partner, for transactions carried on in the name of the firm, after he has ceased to be a partner.”

And in 40 Am. Jur. p. 309 (Sect. 259) it is declared:

“Notice of the retirement of a dormant partner must be given only to those who had some knowledge of his connection with the partnership before his retirement. Inasmuch as he owes no duty of publicity to strangers having no knowledge that he was a member of the partnership, he may retire therefrom without giving notice to the world. The reason for this distinction rests on the presumption that those who knew of his membership in the firm were the only ones who gave credit to the firm relying on this relationship.”

See also: *Collyer v. Egbert*, 200 Wash. 342, 93 P. 2d 399; 47 C. J. pp. 985, 1035, 1137.



In view of the above rule it is clear that the lower Court was correct in holding that Appellants were not liable to the use plaintiff.

*(b) If Appellants were not liable to the use plaintiff, they could not be liable to Appellee.*

We submit that if the use plaintiff in this case had no action against Appellants Goerig and Philp then it follows as a necessary corollary that Continental had no action against these Appellants. The recovery by use plaintiffs as against Continental was based upon a liability incurred by the Macri partners. This recovery was not based upon any liability incurred by Appellants Goerig and Philp. In view of the fact that Continental was not required to provide any indemnity as a result of any act of Goerig and Philp, we submit that there was no possible basis for concluding that Continental can maintain any action as against these Appellants. In short, Appellants Goerig and Philp imposed no liability upon Continental and, therefore, there can be no justification in requiring them to indemnify Continental.

The basis of recovery by Continental in all of these cases was the indemnity clause in the bond application. Certainly an indemnity clause cannot afford a basis of recovery against one who causes no liability to be imposed upon a surety. In this case the action by the use plaintiffs failed as to Appellants Goerig and Philp. It follows that the



surety has no right of recovery against these Appellants. It is well settled that an insurer or surety may not recover over against an indemnitor whose acts have been held not to have caused the liability for which recovery has been had against the surety. A case in point in *Seattle v. Erickson*, 99 Wash. 543, 169 Pac. 985. In that case a contractor entered into a contract with the City of Seattle for the construction of a certain street. The contract provided that the contractor would indemnify the City for all sums paid by the city as a result of actions or suits brought on account of acts of the contractor in the performance of the work. A person who was injured by the condition of the street, during the performance of the contract, brought an action for damages against the City and the contractor. The trial resulted in a dismissal as to the contractor but an award of damages was made as against the City. Thereupon, after paying the judgment, the City instituted an action over against the contractor to recover the sum which it had been compelled to pay. The lower Court entered a judgment of dismissal and this judgment was affirmed by the Supreme Court. The Court declared (p. 986):

It clearly appears from the record that in the prior action against the appellant and the respondent jointly for the negligent injury to Mary Jones the respondent was affirmatively exonerated from liability and the appellant was held for the negligence. Consequently there is now an estoppel by judgment against

the right of the appellant to assert that the respondent is liable over to it for the amount of the recovery in favor of Mary Jones.

See also, to the same effect: *Seattle v. Northern Pac. R. Co.*, 63 Wash. 129, 114 Pac. 1038; *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552, 92 Pac. 411.

This Court has followed the above rule in the case of *Town of Flagstaff v. Walsh* (C.C.A. 9, 1925) 9 F. 2d 590. In that case the facts were as follows: The Town of Flagstaff had entered into a contract with a certain partnership for the construction of a sewer. The partners agreed to indemnify the Town for any liability accumulating to it as a result of their performance of the contract by the partnership. In an action brought against the partnership and the Town, for alleged negligence in the performance of the work, a recovery was had as against all defendants. Upon appeal, however, the judgment against the partnership was reversed and on the second trial a judgment was entered in favor of the partnership. The Town did not perfect its appeal and was required to pay the judgment. The Town thereupon brought an action against the partnership and the bonding company on the indemnity provision of the contract. This Court affirmed the judgment of the lower Court in favor of the defendants, declaring that the judgment in the previous case was a defense to the subsequent action for indemnity. The Court pointed out that a showing of liability on the part of the partnership

was a condition precedent to recovery on the indemnity provision.

Similarly, in the case at bar, a showing of liability on the part of Appellants, which in turn would impose liability upon the surety, is a condition precedent to recovery by the surety on the indemnity provision.

Another case to the same effect is *Buell v. Hall*, 169 Okla. 394, 37 P. 2d 308. That case arose from an action against H. & B., as individuals. The defendants had formerly been associated together in a partnership. Judgment was entered against H. but not against B. Then H. sought to recover over against B., alleging that the judgment which was entered was actually upon a partnership debt. It was held that the judgment in the prior case conclusively determined that the judgment was upon an individual debt and that consequently H. had no right of action over.

The rule applied in the above case has been well stated in the case of *American Surety Co. v. Singer Sewing Mach. Co.*, (D.C.S.D.N.Y., 1937) 18 Fed. Supp. 750. In that case it was held that a bonding company had no right of action over against an indemnitor who had been held not liable in the original action. The Court stated the rule as follows (p. 753):

“Where an indemnitee has been held liable in an earlier action brought against him by a third party and later brings suit to recover

against an indemnitor for the loss so sustained, the indemnitee is concluded as to facts established against him in the earlier action, and if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor, the later action against the indemnitor may not be successfully maintained."

See also *Fidelity & Casualty Co. v. Minneapolis Brewing Co.*, 214 Minn. 436, 8. N. W. 2d 471; 42 C. J. S. Page 619 (Section 32b).

In view of the above principle it is clear that no liability was imposed upon Continental by reason of any act of Appellants Goerig and Philp. We submit that it follows there is no basis for a recovery by Continental as against these Appellants, either with respect to the contract of December 7, 1943, or that of May 18, 1944. Accordingly, the judgment against these Appellants should be reversed.

(3) WITH RESPECT TO CONTRACT OF DEC. 7, 1943, THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS BECAUSE THE JOINT VENTURE AGREEMENT WAS EXECUTED SUBSEQUENT TO THE BOND AND BOND APPLICATION AND BECAUSE APPELLEE WAS NOT A PARTY TO THE JOINT VENTURE AGREEMENT AND NEVER ACCEPTED IT OR ACTED UPON IT.

With respect to contract of Dec. 7, 1943 (Specification No. 1062) the action by Continental against all the cross-defendants was based upon the indemnity provision in the bond application of Dec. 11, 1943. The Appellants Goerig and Philp were not parties to this application or to the bond issued



pursuant thereto.. It can certainly not be contended that these Appellants were parties to the bond by reason of the execution of the joint venture agreement, for the latter agreement was executed four days after the execution of the bond.

It is true that in the joint venture agreement the parties agreed that the bond was to be treated as being executed pursuant to the joint venture agreement, but this agreement was only "as between the parties" to the agreement. Continental was not a party to the joint venture agreement. There was no privity of contract between Appellants and Continental, and no consideration passed from Continental to Appellants. Moreover, since the bond was executed prior to the joint venture agreement, Continental could not have relied upon any act of Goerig and Philp in the execution of the bond. It is well settled that

"... a promise of indemnity is void for want of consideration where made after the execution of the sureties' undertaking." 50 Am. Jur. 1092 (Sect. 284).

Moreover, there is no evidence of any representation either oral or written, by Goerig and Philp upon which Continental could claim to have acted in executing the bond. In short, Continental relied upon and bargained for a contract with the Macri partners. Its contract was with those partners. There was no contract between Continental and Goerig and Philp and no ground or basis of estoppel



between these parties. Continental did not seek, bargain for or obtain any contract of indemnity with Goerig and Philp. We submit that there is no principle of law which could possibly permit Continental to recover upon a contractual promise which was never made to them. It is basic law that one who is not a party to a contract may not ordinarily recover thereupon.

It might be argued that the joint venture agreement was a contract for the benefit of a third party and that Continental may recover as the beneficiary thereof. This argument must fail however, for the reason that Continental was only an incidental beneficiary and under Washington law a beneficiary of this type has no right of action upon the contract. *Ridder v. Blethen*, 24 W. 2d 552, 166 P. 2d 834. Moreover, even if we should concede that Continental was the type of beneficiary entitled to recover under the joint venture agreement, this still would not entitle it to a recovery in the instant case. It is well settled that where parties enter into a contract for the benefit of a third party they may determine or rescind such contract prior to the time the third party has accepted the contract or changed his position in reliance thereupon. The rule is stated in 12 Am. Jur. Page 843 (Sect. 290) as follows:

“According to the weight of authority, the parties to a contract entered into for the benefit of a third person may rescind, vary, or abro-

gate the contract as they see fit, without the assent of the third person, at any time before the contract is accepted, adopted, or acted upon by him, and such rescission deprives the third person of any rights under or because of such contract."

There have been no cases decided by the Supreme Court of the State of Washington which directly involve the right of parties to rescind a contract prior to acceptance or adoption thereof by a third party beneficiary. However, the Washington Court, by a clear implication, has adopted the general rule as announced above. *Huston v. Washington Wood & Coal Co.*, 4 W. 2d 449, 103 P. 2d 1095. See also: 53 A.L.R. 178. In view of these authorities, Continental has no basis for recovery against these Appellants with respect to the contract of December 7, 1943.

## **F. Conclusion:**

We submit that the above authorities conclusively establish that in case No. 11726 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

## **Case No. 11725**

### **A. Factual Statement:**

Case No. 11725 is factually similar to case No. 11726, which has been considered above. The use plaintiff in No. 11725 was a supply company which had furnished materials to Macri & Co. in connection with the irrigation project referred to

above,, and which had not received payment therefor. The defendants, as in No. 11726, were the Macri partners, Appellants Goerig and Philp, and the Continental Casualty Co.

The Continental Casualty Co., as in the case previously discussed, filed a cross-complaint against the Macri partners and against Appellants Goerig and Philp upon the basis of the indemnity provision contained in the bond applications.

The material furnished by the use plaintiff was supplied in connection with the same contracts as were involved in No. 11726, namely, the contract of December 7, 1943, and the contract of May 18, 1944. Similarly, the bond applications and bond involved in No. 11725 are the same as were involved in No. 11726.

The same is true with respect to the joint venture agreements and the contract terminating these joint venture agreements.

These instruments have been discussed in detail in the foregoing consideration of No. 11726 (p. 5-9, Sect. A(1) (2)).

By way of summarization, the significant dates in No. 11725 are set forth in the following table:

*Contract Relating to Specification No. 1062*

December 7, 1943—Date of principal contract between Macri Bros. and Bureau of Reclamation.

December 7, 1943—Date of bond application and bond—Macri partners as principals and Continental Casualty Company as surety.

December 11, 1944—Date of joint venture agreement.

July 15, 1944—Date of termination of joint venture agreement.

April 19, 1944, to February 24, 1945—Period of furnishing labor and materials by use plaintiff.

*Contract Relating to Specification No. 1068*

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri & Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

December 4, 1944, to August 18, 1945—Period of furnishing labor and materials by use plaintiff.

It will be noted from the above table that delivery of materials in connection with the contract of December 7, 1943, was commenced a short time prior to the agreement between the Macri partners and Appellants terminating the joint venture agreement. We deem this fact immaterial, however, in the light of the decision of the lower Court as set forth in the next section of this brief.

## **B. The Judgment of the Lower Court:**

In case No. 11725 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners. It was held, however, that the use



plaintiff was not entitled to judgment as against Appellants Goerig and Philp (Tr. 11725-31-33).

Despite the fact that no recovery was allowed the use plaintiff as against the Appellants Goerig and Philp, the Appellee, Continental Casualty Co., was awarded judgment on its cross-complaint not only as against the Macri partners but as against the aforesaid Appellants. This judgment was in the amount of \$11,941.51. This amount related solely to the contract of May 18, 1944 (Specification No. 1068), payment having been completed by the Macri partners with respect to all materials furnished under the contract of December 7, 1943 (Specification No. 1062). (Tr. 11725-27).

### **C. Specification of Errors Relied Upon:**

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the materials furnished by use plaintiff for which payment was not made were supplied in connection with the contract of May 18, 1944 (Speci-



fication No. 1068), and the joint venture agreement between Appellants Goerig and Philp and the Macri partners was terminated prior to the furnishing of materials in such connection.

3. The Court erred in entering judgment against Appellants and in favor of Continental in connection with the contract of December 7, 1943, for the reason that the joint venture agreement was entered into after the payment and indemnity bond had been furnished by Continental. Accordingly, Appellants were not parties to any contract of indemnity, and assuming that the joint venture agreement was a contract for the benefit of Continental, then Continental nevertheless has no right to recover thereupon because the joint venture agreement was terminated prior to any acceptance or act in reliance thereupon by Continental.

4. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants were held to be not liable to the use plaintiff for the materials and labor furnished by him; and, accordingly, Appellants may not be held liable to Continental because an indemnitor may not be held liable to his indemnitee where the acts of the former did not cause payment by the latter under the surety clause.

The foregoing specifications are included in the statement of points on appeal which is set forth at

page 37 of the Transcript of Record in case No. 11725.

#### **D. Summary of Argument:**

(1) With respect to both the December 7, 1943, and the May 18, 1944 contracts the bonds were furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit or performance of the person who applies for the bond and may look only to him for indemnity.

(2) There was no liability to use plaintiff with respect to the contract of December 7, 1943. With respect to the contract of May 18, 1944, materials were not furnished by the use plaintiff until after the termination of the joint venture agreement between the Appellants and the Macri partners. A partner is not liable for the acts of his former partners which take place subsequent to the dissolution of the partnership. Since the relationship between Appellants and the Macri partners was secret, and the Appellants were merely dormant partners, it was not necessary for them to give notice of the

termination or dissolution of the joint venture agreement. Accordingly, the lower Court correctly held that there was no liability in favor of the use plaintiff and against Appellants. It follows that Continental has no right of action over against these Appellants, for it is well settled that a judgment of dismissal against an indemnitor precludes the surety from recovering over against him.

(3) As indicated above, it was held by the lower Court that there was no liability to use plaintiff with respect to the contract of December 7, 1943. Accordingly there can be no basis for a judgment over in favor of Continental with respect to this contract. Moreover, the joint venture agreement between Appellants and the Macri partners was not entered into until after the execution of the December 7, 1943 contract and after the execution of the bond application and bond which related to that contract. There was, therefore, no privity of contract between Appellants and Continental and there was no evidence of any basis of estoppel against Appellants. At most the joint venture was a contract for the benefit of Continental which was rescinded prior to any acceptance or act by Continental in reliance thereupon. It is well settled that under such circumstances the third party beneficiary has no right of recovery.

### **E. Argument:**

(1) THE COURT ERRED IN ENTERING JUDGMENT

AGAINST APPELLANTS FOR THE REASON THAT APPELLANTS WERE NOT PARTIES TO THE INDEMNITY CONTRACT UPON WHICH APPELLEE'S ACTION IS BASED.

As indicated above, the contractual instruments involved in case No. 11725 are the same as those involved in case No. 11726. It is our position that since Appellants Goerig and Philp were not parties to the contracts, or to the bond applications or bonds, there is no basis for any judgment against them. In this connection, the argument heretofore made at p. 14-16, sect. E (1) of this brief is fully applicable and we hereby incorporate the said section herein by reference.

(2) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE JOINT VENTURE AGREEMENT HAD BEEN TERMINATED AND DISSOLVED PRIOR TO THE TIME OF FURNISHING LABOR AND MATERIALS TO USE PLAINTIFF.

As indicated above, the lower Court held that there was no liability in favor of use plaintiff with respect to the contract of December 7, 1943. With respect to the contract of May 18, 1944, the joint venture agreement between the Macri partners and Appellants had been terminated prior to the time of furnishing materials. Since a dormant partner is not liable for the acts of his former associates after his withdrawal from a partnership, the lower Court correctly dismissed the action of the use plaintiff as against Appellants Goerig and Philp; and since



these Appellants were not liable to the use plaintiff it follows that they could not be liable to the surety on the indemnity clause of the bond application. In this connection, the argument made hereinabove at p. 17-25, Sect. E (2) (a) and (b) is fully applicable and we hereby incorporate the said sections herein.

(3) WITH RESPECT TO THE CONTRACT OF DECEMBER 7, 1943, THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS BECAUSE THE JOINT VENTURE AGREEMENT WAS EXECUTED SUBSEQUENT TO THE BOND AND BOND APPLICATION AND BECAUSE APPELLEE WAS NOT A PARTY TO THE JOINT VENTURE AGREEMENT AND NEVER ACCEPTED IT OR ACTED UPON IT.

As stated above, it was held by the lower Court that there was no liability in favor of use plaintiff with respect to the contract of December 7, 1943. In any event there could have been no liability in favor of Continental as against Appellants Goerig and Philp with respect to this contract because Goerig and Philp had not entered into the joint venture agreement with the Macri partners until after the execution of the bond application and bond which related to the December 7, 1943 contract. In other words, Goerig and Philp were not parties to the indemnity clause upon which Appellee's cross-complaint must be based. Likewise, Appellee was not a party to the joint venture agreement and accordingly has no right of action thereupon. Appel-



lee may not sue upon the joint venture agreement as a third party beneficiary because it was not accepted or acted upon by Appellee prior to the time of its rescision and termination.

In this connection the argument hereinabove made at p. 25-28, Sect. E (3) is fully applicable and is hereby incorporated herein by reference.

## **F. Conclusion:**

We submit that the above authorities conclusively establish that in case No. 11725 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

## **Case No. 11724**

### **A. Factual Statement:**

Case No. 11724 involved only the contract of May 18, 1944. The complaint of the use plaintiff was based upon the furnishing of materials in connection with the carrying out of this contract for which payment had not been made. The defendants, as in the previous cases, were the Macri partners, Appellants Goerig and Philp, and the Continental Casualty Co., which furnished the payment bond in connection with the contract.

The Continental Casualty Co., as in the previous cases, filed a cross-complaint against the Macri partners and against Goerig and Philp upon the basis of the indemnity provision contained in the bond application.

The bond application and bond involved in No. 11724 were those heretofore discussed in connection with the contract of May 18, 1944. Similarly, the joint venture agreement and the termination thereof are those referred to hereinabove in connection with the discussion of the May 18, 1944 contract.

These instruments have been discussed in detail in the foregoing consideration of case No. 11726 (p. 8-9, Sect. A (2)).

By way of summarization the significant dates are set forth in the following table:

*Contract Relating to Specification No. 1068*

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

January 26, 1945, to June 13, 1945—Period of furnishing labor and materials by use plaintiff.

## **B. The Judgment of the Lower Court:**

In Case No. 11724 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners. As against Appellants Goerig & Philp the use plaintiff's cause of action was dismissed (Tr. 11724—27-29).

Although no recovery was allowed the use plain-

tiff as against Appellants Goerig & Philp, the Appellee, Continental Casualty Co., was awarded judgment on its cross-complaint both as against the Macri partners and as against the aforesaid Appellants. This judgment was in the amount of \$4,994.68. It is to be noted that this amount relates solely to materials furnished by the use plaintiff to Macri & Co. after the termination of the joint venture agreement between the Macri partners and Appellants (Tr. 11724—22).

### **C. Specification of Errors Relied Upon:**

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the materials furnished by use plaintiff for which payment was not made were supplied in connection with the contract of May 18, 1944 (Specification No. 1068), and the joint venture agreement between Appellants Goerig and Philp and the Macri partners was terminated prior to the furnishing of materials in such connection.

3. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants were held to be not liable to the use plaintiff for the materials and labor furnished by him; and, accordingly, Appellants may not be held liable to Continental because an indemnitor may not be held liable to his indemnitee where the acts of the former did not cause payment by the latter under the surety clause.

The foregoing specifications are included in the statement of points on appeal which is set forth at page 34 of the Transcript of Record in case No. 11724.

#### **D. Summary of Argument:**

(1) This case involves the contract of May 18, 1944. The bond in this case was furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit or performance of the person who applies for the bond and may look only to him for indemnity.

(2) In this case no materials were furnished by



the use plaintiff until after the termination of the joint venture agreement between the Appellants and the Macri partners. A partner is not liable for the acts of his former partners which take place subsequent to the dissolution of the partnership. Since the relationship between Appellants and the Macri partners was secret, and the Appellants were merely dormant partners, it was not necessary for them to give notice of the termination or dissolution of the joint venture agreement. Accordingly, the lower Court correctly held that there was no liability in favor of the use plaintiff and against Appellants. It follows that Continental has no right of action over against these Appellants, for it is well settled that a judgment of dismissal against an indemnitor precludes the surety from recovering over against him.

### **E. Argument:**

(1) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT APPELLANTS WERE NOT PARTIES TO THE INDEMNITY CONTRACT UPON WHICH APPELLEE'S ACTION IS BASED.

Appellants Goerig and Philp were not parties to the bond or bond application relating to the contract of May 18, 1944, which is the only contract involved in this case. Accordingly, we submit that there is no basis for any judgment against Appellants. In this connection we hereby incorporate



herein by reference the argument heretofore made at p. 14-16, Sect. E (1).

(2) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE JOINT VENTURE AGREEMENT HAD BEEN TERMINATED AND DISSOLVED PRIOR TO THE TIME OF FURNISHING LABOR AND MATERIALS TO USE PLAINTIFF.

As shown by the foregoing table of dates, the use plaintiff in this case did not furnish materials to the Macri partners until the joint venture between the Macri partners and Appellants had been terminated. Since a dormant partner is not liable for the acts of his former associates after his withdrawal from a partnership, the lower Court correctly dismissed the action of the use plaintiff as against Appellants Goerig and Philp; and since these Appellants were not liable to the use plaintiff it follows that they could not be liable to the surety on the indemnity clause of the bond application. In this connection we hereby incorporate herein the argument made hereinabove at p. 17-25, Sect. E (2) (a) and (b).

### **F. Conclusion:**

We submit that the above authorities conclusively establish that in case No. 11724 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

**Case No. 11722****A. Factual Statement:**

In case No. 11722 the action of the use plaintiff was based upon the furnishing of materials to the Macri partners in connection with the carrying out of the contract of May 18, 1944. The complaint alleged that payment for these materials had not been made and named as defendants the Macri partners, Appellants Goerig and Philp, and the Continental Casualty Co., which had furnished the payment bond required by the Miller Act.

The Continental Casualty Co., as in the previous cases, filed a cross-complaint against the Macri partners and against Appellants Goerig and Philp upon the basis of the indemnity provision contained in the bond application.

The joint venture agreement and the contract terminating this agreement are those previously discussed herein. The termination of the said joint venture agreement took place prior to the delivery of materials by the use plaintiff in this case. (Tr. 44-45).

These instruments have been discussed in detail in the foregoing consideration of case No. 11726, p. 8-9, Sect. A (2).

By way of summarization the significant dates are set forth in the following table:

*Contract Relating to Specification No. 1068*  
December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri & Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

May 1, 1945, to October 30, 1945—Period of furnishing labor and materials by use plaintiff.

### **B. The Judgment of the Lower Court:**

In Case No. 11722 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners, but dismissed the action of the use plaintiff as to Appellants Goerig and Philp (Tr. 48-49).

As in the previous cases, despite the dismissal of the use plaintiff's action against Appellants, a judgment was entered against them upon the cross-complaint of the surety company. This judgment was in the amount of \$3,842.83 (Tr. 48).

### **C. Specification of Errors Relied Upon:**

The specification of errors relied upon by Appellants in case No. 11722 are the same as those relied upon in case No. 11724. These specifications are set forth hereinabove at page 39-40 and are hereby incorporated herein by reference. The said specifications are included in the statement of points on appeal which are set forth on page 53 in the Transcript of Record in case No. 11725.

### **D. Summary of Argument:**

The argument heretofore made with respect to case No. 11724 is applicable in its entirety to case No. 11722. Accordingly, the summary of the argument made in connection with case No. 11724 is hereby incorporated by reference as the summary of argument in case No. 11722.

### **E. Argument:**

The argument heretofore made with respect to case No. 11724 is applicable in its entirety to case No. 11722. Said argument is hereby incorporated herein by reference and shall be deemed to be Appellants' argument with respect to case No. 11722.

### **F. Conclusion:**

We submit that the above authorities conclusively establish that in case No. 11722 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

## **Case No. 11723**

### **A. Factual Statement:**

In Case No. 11723 the use plaintiff sued to recover for materials furnished to the Macri partners in connection with the carrying out of the May 18, 1944 contract. The defendants were the same as those named in the previous cases, namely, the Macri partners, Appellants Goerig and Philp and the Continental Casualty Co. Continental, as in the previous cases, filed a cross-complaint against the



Macri partners and against Goerig and Philp upon the basis of the indemnity provision contained in the application for the bond which was required under the Miller Act.

The bond application and bond involved in No. 11723 were those heretofore discussed in connection with the contract of May 18, 1944. Similarly, the joint venture agreement and the termination thereof are those referred to above in connection with the discussion of the May 18, 1944 contract.

These instruments have been discussed in detail in the foregoing consideration of case No. 11726 (p. 8-9, Sect. A (2)).

### **B. The Judgment of the Lower Court**

In case No. 11723 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners *and against Appellants Goerig and Philp*. (Tr. 11723—30-32). This case is significant in that it is the only one of the five cases involved in these appeals in which judgment was entered against Appellants and in favor of the use plaintiff. The theory of the lower Court in entering judgment against Appellants and in favor of the use plaintiff in this particular case was that the materials which were furnished by the use plaintiff were furnished pursuant to a contract between Macri & Co. and the use plaintiff which was entered into during the existence of the joint venture agreement between Macri & Co. and Appellants. In this connec-



tion, it is the position of Appellants that there is no evidence whatsoever in the record which would warrant the conclusion that any of the materials were supplied during the existence of the said joint venture agreement or pursuant to any contract made during the existence of said agreement.

Judgment was also entered against Appellants Goerig and Philp and in favor of the Continental Casualty Co. in the amount of \$7,262.91 (Tr. 11723—30-32). In view of the judgment against Appellants and in favor of the use plaintiff, the appeal in this case has been perfected as to both Continental and the use plaintiff (Tr. 11723—32-43).

### **C. Specification of Errors Relied Upon:**

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of the use plaintiff for the reason that there was no evidence whatsoever which would support the conclusion of the lower Court that the materials furnished by the use plaintiff were supplied in connection with any contract

or agreement which was made during the existence of the joint venture agreement between Appellants and the Macri partners.

3. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the judgment against Appellants and in favor of the use plaintiff was erroneous; and if Appellants were not liable to the use plaintiff they could not have been liable to Continental on the basis of the indemnity clause of the bond application.

The foregoing specifications are included in the statement of points on appeal which is set forth at page 36 of the Transcript of Record in case No. 11723.

#### **D. Summary of Argument:**

(1) This case involved the contract of May 18, 1944. The bond in this case was furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit or per-

formance of the person who applies for the bond and may look only to him for indemnity.

(2) In this case the judgment against Appellants and in favor of use plaintiff was based upon the theory that the materials furnished by the use plaintiff to Macri & Co. were furnished pursuant to a contract entered into between the use plaintiff and Macri & Co. during the existence of the joint venture between the Macri partners and Appellants Goerig & Philp (Tr. 11723—24-25). There is no evidence whatsoever to support this conclusion. The complaint of the use plaintiff (Tr. 11723—9) admits that materials were not delivered until July 1944, and the joint venture agreement between the Macri partners and Appellants was terminated on July 15, 1944. There is no evidence to support the conclusion that these materials were furnished pursuant to a contract entered into prior to this termination agreement. Accordingly, the judgment in favor of use plaintiff and against Appellants was erroneous. It follows that the judgment in favor of Continental Casualty Co. and against Appellants is also erroneous, for if Appellants were not liable to the use plaintiff they could not be liable to Continental on the basis of the indemnity clause.

### **E. Argument:**

(1) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT APPELLANTS WERE NOT PARTIES TO THE INDEMNITY CON-

TRACT UPON WHICH APPELLEE'S ACTION IS BASED.

Appellants Goerig and Philp were not parties to the bond or bond application relating to the contract of May 18, 1944, which is the only contract involved in this case. Accordingly, we submit that there is no basis for any judgment against Appellants. In this connection were hereby incorporate herein the argument heretofore made at p. 14-16, Sect. E (1).

(2 THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE EVIDENCE DOES NOT SUPPORT THE JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF USE PLAINTIFF; AND IF APPELLANTS WERE NOT LIABLE TO THE USE PLAINTIFF THEY COULD NOT BE LIABLE TO THE SURETY COMPANY.

As demonstrated in the foregoing argument, a silent or dormant partner is not liable for the acts of his associates after his withdrawal from the partnership (p. 18-21, Sect. E (2) (a)). On the basis of this principle, in all of the cases discussed previously, the Court dismissed the action of the respective use plaintiffs as against Appellants for the reason that the action in each of these cases was based upon acts of Macri & Co. after Appellants had withdrawn from the joint venture agreement. In the instant case the Court concluded that the use plaintiff was entitled to judgment against Appellants on the theory that the materials which were



furnished by the use plaintiff were supplied pursuant to a contract which was made during the existence of the joint venture agreement. We submit that there was no evidence whatsoever which could possibly support this conclusion. Accordingly, on the basis of the principle applied by the Court in the cases previously discussed, this judgment against Appellants and in favor of the use plaintiff is entirely erroneous.

It follows that the judgment in favor of Continental and against Appellants is also erroneous for the reasons herein discussed above at p. 17-25, (Sect. E (2) (a) and (b)). The said sections are hereby incorporated herein by reference.

### **F. Conclusion:**

We submit that the above authorities conclusively establish that in case No. 11723 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

Respectfully submitted,

BROWN & HAWKINS,  
FERGUSON, BURDELL & ARMSTRONG,  
*Attorneys for Appellants*

Office and Post Office Address:  
1012 Northern Life Tower,  
Seattle 1, Washington.





---

Nos. 11722, 11723, 11724, 11725, 11726

IN THE  
**United States Circuit Court  
of Appeals**

FOR THE NINTH CIRCUIT

A. J. GOERIG and CLYDE PHILP, *Appellants,*  
v.  
CONTINENTAL CASUALTY COMPANY, A Corporation,  
*Appellee,*

A. J. GOERIG and CLYDE PHILP, *Appellants,*  
v.  
CONTINENTAL CASUALTY COMPANY, A Corporation,  
and J. W. MORRISON, an individual, doing business  
as J. W. MORRISON COMPANY, *Appellees.*

---

**BRIEF OF APPELLEE**

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

---

HONORABLE SAM M. DRIVER, *Judge*

---

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN  
WILLARD E. SKEEL,  
*Attorneys for Appellee*

Office and Post Office Address:  
914 Insurance Building,  
Seattle 4, Washington.

**FILED**

NOV 15 1948



## INDEX

	<i>Pages</i>
Question Involved in the Case.....	2
Preliminary Statement .....	2
Statement of the Case .....	3
Argument .....	8
(a) Joint Adventurers Are Liable as Partners.....	9
(b) Partners Are Each Liable for Obligations Incurred Within the Scope of the Partnership Business.....	13
(c) A Silent or Dormant Partner Is Liable on Partnership Obligations to Third Parties .....	16
(d) Answer to Contentions of Appellants .....	21
Conclusion .....	34

## TABLE OF CONTENTS

Alaska Steamship Company v. Sperry, 107 Wash. 545; 182 Pac. 634	31
Finney v. Terrell (Tex. Civ. App.) 276 S.W. 340 (1925).....	12
Kennedy v. Conrad, 9 P.(2d) 1075 .....	15
O. K. Boiler & Welding Company v. Minnetonka Lumber Company, 229 Pac. 1045 .....	12, 18
Priestley v. Peterson, 19 Wn.(2d) 820; 145 P.(2d) 253.....	12, 14
Seattle v. Ericksen, 99 Wash. 543; 169 Pac. 985.....	31
Southern Surety Co. v. Plott (C. C. A. 4, 1928) 28 F.(2d) 698.....	23
State ex rel Crane Company v. Stokke (S.D.) 272 N.W. 811.....	10, 19
Town of Flagstaff v. Walsh (C. C. A. 9, 1925) 9 F.(2d) 590.....	32

## TEXT BOOKS

	<i>Pages</i>
48 A.L.R. 1060 .....	11
8 Am. Juris., "Bonds," Sec. 10, Page 710.....	25
30 Am. Juris., Joint Adventures, Sec. 41 .....	17
40 Am. Juris., Partnership, Paragraph 156, Page 240.....	23
50 Am. Juris., Suretyship, Page 1066.....	15
33 Corpus Juris, Page 871, Sec. 99 .....	14
47 Corpus Juris. Partnership, Sec. 384.....	17
48 Corpus Juris Secundum, Joint Adventure, Sec. 14a.....	11
Professor Frank L. Meachem, 15 Minn. Law Review 44.....	9



Nos. 11722, 11723, 11724, 11725, 11726

IN THE  
**United States Circuit Court  
of Appeals**

FOR THE NINTH CIRCUIT

A. J. GOERIG and CLYDE PHILP, *Appellants,*  
v.  
CONTINENTAL CASUALTY COMPANY, A Corporation,  
*Appellee,*

A. J. GOERIG and CLYDE PHILP, *Appellants,*  
v.  
CONTINENTAL CASUALTY COMPANY, A Corporation,  
and J. W. MORRISON, an individual, doing business  
as J. W. MORRISON COMPANY, *Appellees.*

---

**BRIEF OF APPELLEE**

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

---

HONORABLE SAM M. DRIVER, *Judge*

---

SKEEL, MCKELVY, HENKE,  
EVENSON & UHLMANN  
WILLARD E. SKEEL,  
*Attorneys for Appellee*

Office and Post Office Address:  
914 Insurance Building,  
Seattle 4, Washington.

## QUESTION INVOLVED IN THE CASE

Is appellee, Continental Casualty Company, who was adjudged liable on its payment bond to each of five Use Plaintiffs, entitled to judgment over on its cross complaint against appellants, Goerig and Philp, who were silent partners of the contractor, Macri & Co., where the Use Plaintiffs did not recover judgment directly against the appellants, Goerig and Philp? The Trial Court granted such recovery.

## PRELIMINARY STATEMENT

The five cases here on appeal were by pretrial order of the district court consolidated for trial and heard at one time. (Tr. 11722-17; 11723-19; 11724-17; 11725-19; 11726-16). For all practical purposes and except as hereafter noted, all five cases here on appeal have the same factual basis and the same law is applicable in each case.

Appellee concurs in appellants' jurisdictional statement. The only material difference in the five cases is (1) in No. 11726 the Use Plaintiff recovered a judgment of \$919.97 against Specification No. 1062; and (2) in case No. 11723 the Use Plaintiff recovered judgment against appellants, Goerig and Philp, as well as against Continental Casualty Company and the Macri partners. In all the other cases, the Use Plaintiffs were

allowed judgment only against the Macri partners and appellee bonding company. In all of the cases, the appellee, Continental Casualty Company, was granted judgment over on its cross complaint against the appellants, Goerig and Philp.

### STATEMENT OF THE CASE

On December 7, 1943, Macri & Company entered into a contract with the United States of America referred to as Specification No. 1062 (Tr. 58). As a necessary condition precedent to the entering into of said contract, Macri & Company procured a payment bond from Continental Casualty Company, which was also dated December 7, 1943 (Tr. 60). It will be noted that the agent or attorney-in-fact for Continental Casualty Company in the writing of this bond was one of the appellants, Clyde E. Philp.

As a condition precedent to obtaining Continental Casualty Company's payment bond, Macri & Company, acting by and through Sam Macri, executed an application for such bond which contained an indemnity agreement, which, in part, reads as follows (Tr. 67) ;

“Second, to indemnify the Company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof,

in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom and in enforcing any of the agreements herein contained."

This application and indemnity agreement was likewise dated December 7, 1943.

On December 11, 1943, the appellants, Goerig and Philp, and the defendants, Sam Macri, Joe Macri and Don Macri, entered into a joint venture agreement in connection with the contract referred to as Specification No. 1062. The joint venture agreement among other things provided for the division of profits and the method of sharing losses. The joint venture agreement in connection with the execution of the contract Specification No. 1062 and the obtaining of the payment bond from Continental Casualty Company provided as follows (Tr. 93):

"That said contract (or subcontract) may be signed by the parties hereto, and as a party thereto as a partnership, or may be signed by one or some of the parties hereto, as the principal contractor, *yet, regardless of how said instrument may be signed and executed, or the manner thereof, it is agreed that it was understood between the parties hereto that the same was executed for and on behalf of the parties hereto in proportion to their interest herein*, and as hereinafter stated, and that it would be performed by the parties hereto under this Agreement of Joint Venture, and that any performance bonds, or otherwise, might be required to be executed and delivered through or by such insurance or surety company

or companies as might be engaged by the parties hereto in that regard.

*“It is further agreed that whether said contract (or subcontract) or said bond (or bonds) or insurance policy, bear a date prior to this agreement or subsequent hereto, it is to be of no controlling effect as between the parties and that regardless of the date of any of said instruments, they were or are to be executed, and are to be treated as being executed and delivered in pursuance to this Agreement of Joint Venture regardless of their respective dates.”*

The joint venture agreement likewise provided that bond and bond application including the indemnification agreement was the engagement and obligation of each of the parties to the joint venture agreement (Tr. 95) :

*“Each of the parties hereto acknowledge their interest in the performance of said contract (or subcontract) and their agreement to share the profits and losses coming, arising or growing out of the same in the proportion as hereinafter stated, and this agreement further evidences the oral engagement and understanding of each of the parties hereto that it was a part of the engagement imposed upon each of the parties hereto to join, jointly and severally, in any indemnification agreement which any insurance, surety or casualty company might require incident to its execution of said bonds. This instrument, therefore, further evidences the obligation of the parties to execute such indemnification agreement as said insurance company may require, and may be treated and considered as conclusive evidence of the interest of each of the parties hereto in said project, and their agreement and obligation to*



*execute said indemnifying agreements in accordance with their understanding had and accomplished heretofore in reference to said matters."*

On May 18, 1944, Macri & Company, acting by and through Sam Macri, entered into a contract with the United States of America referred to as Specification No. 1068 (Tr. 62). Also on May 18, 1944, Macri & Company obtained payment bond from Continental Casualty Company covering the contract Specification No. 1068 and which was a necessary prerequisite to entering into such contract with the United States. Also as a necessary prerequisite to obtaining the bond, Macri & Company, acting by and through Joe Macri, signed the necessary application for bond, including indemnity agreement (Tr. 80).

In connection with contract Specification 1068, appellants, Goerig and Philp, and defendants, Sam Macri, Joe Macri and Don Macri, previously entered into a joint venture agreement, which was dated December 11, 1943 (Tr. 100). The bond, the bond application, including indemnity agreement, and the joint venture agreement were exactly the same as the documents previously executed in connection with contract Specification 1062 and contained the same provisions. It will be noted, however, that in connection with Specification 1068, the joint venture agreement was executed and signed December 11, 1943, and thus the contract

Specification 1068, the bond, and the bond application, including the indemnity agreement, were executed in compliance with and under the provisions of the said joint venture agreement.

In bringing their actions, each of the five Use Plaintiffs named as parties defendant, the appellants, Goerig and Philp, and designated them as partners or joint adventurers doing business under the name of Macri & Co. The trial court in its findings in each case (Tr. 11722-40, 11723-22, 11724-20, 11725-22, 11726-20) found that appellants, Goerig and Philp, had been previously associated with the Macris under a joint venture agreement. The trial court further found that the bond application, including the indemnity agreement, was executed and that the bond was issued for and on behalf of all of the co-partners and joint adventurers, including the appellants, Goerig and Philp (Tr. 11722-44, 11723-27, 11724-24, 11725-28, 11726-24).

In each of the five cases, the Use Plaintiffs recovered judgment against the Macri partners and against the Continental Casualty Company on its bond. In none of the five cases except No. 11723 were the Use Plaintiffs granted judgment against the appellants, Goerig and Philp; this, apparently, on the theory that none of the four Use Plaintiffs commenced to furnish labor or material until a date subsequent to the execution of

the so-called "termination agreement." In case No. 11723, the Use Plaintiff was granted judgment likewise against the appellants, Goerig and Philp, on the theory that in that one case, Use Plaintiff had furnished labor and material prior to the execution of the "so-called" termination agreement.

In each of the five cases, the appellee, Continental Casualty Company, was granted judgment over against each of the joint adventurers, including appellants, Goerig and Philp, in amounts equal to judgments which had been rendered against the bonding company in favor of the Use Plaintiffs.

### ARGUMENT

The judgments obtained by the Use Plaintiffs against Continental Casualty Company aggregated approximately \$33,500, which included interest, attorneys' fees and costs, and all of said judgments were procured under contract Specification No. 1068, except one small judgment in the amount of \$919.97 was obtained under Specification No. 1062. A summary of the pertinent dates involved under Specification No. 1068 were:

1. December 11, 1943, date of joint venture agreement.
2. May 18, 1944, date of contract, Specification 1068 with the United States.

3. May 18, 1944, date of bond and bond application relating to Specification 1068.
4. July 15, 1944, date of so-called "Termination Agreement."

From an analysis of the foregoing dates, it is clear that contract Specification No. 1068 was entered into by Macri & Co. on behalf of the joint adventurers including the appellants, Goerig and Philp. It is likewise clear that the bond and bond application were entered into on behalf of and under the authority of the joint venture agreement by all of the joint venturers, including appellants, Goerig and Philp. Under these facts, the only questions for determination by this court are: (1) the nature, effect and legal status of a joint venture, and (2) the extent of the legal liability and obligations to be imposed upon a dormant or silent partner.

#### **a. Joint Adventurers Are Liable as Partners**

The subject of joint adventures is of comparatively modern origin, yet by the great weight of authority in the United States, the law applicable to a joint adventure is governed by the same rules of law applicable to partnerships.

A very thorough analysis of the legal relationship known as joint adventure was made by Professor Frank L. Meachem in 15 Minn. Law Review 44. The

following extracts from his article are quoted with approval by the court in *State ex rel Crane Company v. Stokke*, (S. D.) 272 N. W. 811:

“On the whole the concept of joint adventure as a relationship or association different from partnership seems to have little, if any, reality. To a lawyer or a litigant it can make no difference in the present state of the law whether the court calls the association by one name or another. For all practical purposes no one cares very much whether the law treats joint adventures as a special type of partnership or a different kind of association. The consequences of being held to be one or the other are almost, if not quite, identical.”

\* \* \*

“When the law has progressed to this point—viz., applying the same test and reaching the same legal consequences for both partnership and joint adventure—the usefulness of regarding joint adventure as a distinct kind of relationship or association seems questionable.”

\* \* \*

“... at the present time, there is no law of joint adventure. There is a law of partnership and that is all. The law of partnership is applied point for point to all joint adventure controversy and identical results are reached under similar circumstances, no matter whether the association is regarded as a partnership or as a joint adventure. It logically follows from this that there is no reason for distinguishing partnership and joint adventure situations by making a separate classification for the latter, unless perhaps for the purposes of convenience in describing a kind of partnership, and even so it is arguable that the English practice of calling it a special partnership is more in har-



mony with a desire for simplicity and uniformity in the classification of law and legal relations."

The South Dakota court stated its approval of Professor Meachem's view in the following words:

"We are under no necessity in the instant case of determining whether or not the law of this state does or should recognize joint adventure as a legal relationship different and distinct from partnership . . . It is well established by the great majority of decided cases that there is the same element of mutual agency in joint adventures as in partnerships and that a member of a joint adventure can bind his associates whether disclosed or undisclosed (as can a partner) by such contracts as are reasonably necessary to carry on the venture."

The text writers are likewise in accord with the rule that joint adventures and partnerships are to be governed by one and the same law in that the same rules apply to each. In 48 *Corpus Juris Secundum*, Joint Adventure, Sec. 14a, the following statement is made:

"Liability of one member of a joint enterprise or adventure for acts of another member . . . is governed largely by principles analogous to those applicable to partnership and agency."

To the same effect is the following extract from 48 A. L. R. 1060:

"Generally speaking it may be said that practically the only distinction between a joint adventure and a partnership is that the former relates to a single transaction (though it may comprehend a business to be continued over several years)

while the latter relates to a general business of a particular kind."

In *Finney v. Terrell* (Tex. Civ. App.) 276 S. W. 340 (1935) the Texas Court spoke as follows:

"The subject of joint adventures is comparatively of modern origin. It was unknown at common law, being regarded as within the principle governing partnerships. And while some jurisdictions hold that the joint adventure is not identical with partnership, it is everywhere regarded as of a similar nature and governed by the same rules of law."

The State of Washington has adopted the foregoing rules as laid down by the text writers and by Professor Meachem. In the case of *Priestley v. Peterson*, 19 Wn.(2d) 820; 145 P.(2d) 253, the court said:

"The term joint adventure is rather new to the law, but the principles which control agreements of joint adventurers have often been discussed in cases involving alleged partnerships."

To the same effect is the case of *O. K. Boiler & Welding Company v. Minnetonka Lumber Company*, 229 Pac. 1045, in which the court said:

"After the parties have created and engaged in a joint enterprise, although it may relate to a single transaction, the law of partnership applies to the questions arising between and among the parties and in relation to third parties."

**b. Partners Are Each Liable for Obligations Incurred  
Within the Scope of the Partnership Business**

The appellants, Goerig and Philp, by signing the joint venture agreement with the Macri partners in connection with contract Specification 1068, specifically authorized the obtaining of necessary bond to perform the contract and specifically assume the obligation under such bond, the bond application and the indemnity agreement (Tr. 94, 95). Such specific assumption of liability would not, however, be necessary as it is clearly the established law that one party to a joint adventure or one partner can bind all partners to that joint adventure in contract. The only limitation is that such contracts must be contracts reasonably necessary to carry on the business in which the joint adventurers are engaged. Appellants, Goerig and Philp, cannot plead they were ignorant of the necessity to obtain such bond as a prerequisite to entering into the contract with the United States government, because the joint venture agreement specifically mentions the obtaining of bond for the carrying on of the work. Also the Miller Act (40 U. S. C. A. Sections 270a and 270b) under which the government contract was let, specifically calls for a performance and payment bond. Appellants, Goerig and Philp, cannot plead ignorance of the fact that a bond was actually obtained in view of the fact that the appellant, Clyde Philp was himself the agent

who obtained the bond (Tr. 62). The obtaining of a surety bond was necessary in the performance of the contract with the United States (40 U. S. C. A., Sec. 270a and Sec. 270b).

The authorities are uniform that the act of one partner will bind all partners insofar as such act is within the general scope of the partnership business. The State of Washington has adopted such uniform rule in the case of *Priestley v. Peterson*, 19 Wn.(2d) 820; 145 P.(2d) 253, wherein the Supreme Court of the State of Washington said:

‘It is the general rule that where parties become joint adventurers the act of one will bind all insofar as such act is within the general scope of the enterprise.’

The court then quoted with approval from 33 Corpus Juris, Page 871, § 99, as follows:

“As to third persons who deal with a joint adventurer in good faith and without knowledge of any limitations upon his authority, the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are engaged, and they become liable upon such contracts notwithstanding they may have expressly agreed amongst themselves that they should not be liable. But he cannot bind his associates by contracts made outside of the scope of the business in which they are engaged, or by contracts made for his individual benefit.”

To the same effect is the following extract in the

opinion of the court in *Kennedy v. Conrad*, 9 P.(2d) 1075:

“The general rule is that as to third persons who deal with a joint adventurer in good faith and without knowledge of any limitation upon his authority, the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are engaged, and they become liable on such contracts notwithstanding they may have expressly agreed amongst themselves that they should not be liable.”

The same general rule applies in favor of a surety to impose liability upon all the partners who compose the partnership firm at the time the partnership assumed the liability of the issuance of the surety bond. This rule is set forth in 50 Amer. Juris., “Suretyship,” Page 1066:

“A surety for a partnership debt has a right of action, on discharging the obligation, against all who composed the firm at the time they assumed the liability. This rule has been applied in respect to sureties in an attachment bond, given as a substitute for partnership property attached or a partnership debt although judgment in the action was obtained against only one partner.”

Insofar as all judgments obtained under Specification 1068 are concerned, appellee, Continental Casualty Company, under the application of this rule is entitled to judgment over against appellants, Goerig and Philp. In connection with Specification 1068, the joint venture



agreement specifically granted the Macris authority to procure bonds and sign indemnity agreements which were binding upon all the joint adventures, was executed December 7, 1943. While such joint venture agreement was in full force and effect, the Macri partnership exercising the authority therein granted, procured and executed the contract Specification 1068, the bond, bond application and indemnity agreement for the benefit of all joint adventurers. It cannot be contended that appellants, Goerig and Philp, received no benefits from the execution of the contract, bond and bond application. They are liable to appellee, Continental Casualty Company, in the same manner as a partner is liable for partnership debts and obligations.

**c. A Silent or Dormant Partner Is Liable on Partnership Obligations to Third Parties**

It may be conceded that appellants, Goerig and Philp, were not active in the actual prosecution of the work on either contract Specification 1068 or 1062 and were, therefore, silent or dormant partners with the Macris.

A silent or dormant partner or an undisclosed principal is liable to third parties on contracts which are reasonably necessary to carry on the partnership venture. Such is the law as expressed by the great weight of authority in the United States. The rule is well

stated in 47 Corpus Juris, Partnership, § 384, as follows:

“The rule that an undisclosed principal is liable for contracts made or benefits secured for him by his agent applies to a case where there is an undisclosed or dormant partner. As regards innocent third parties, an undisclosed or dormant partner, as a general rule, is liable for, and bound by, what the acting partner says or does within the scope of the partnership business, and if the acting partner enters into a contract, secures a benefit, or otherwise incurs an obligation in behalf of the firm, within the ordinary scope of the firm’s business, without the fact that he is acting for an existing partnership, or that there is a dormant partner being disclosed or known to the other party to the transaction, the ensuing liability on such obligation may, at the election of the other party, be enforced against the acting party individually, or it may be enforced against the firm or the undisclosed partner or partners, or against the dormant partner, as the case may be. Under such circumstances the undisclosed or dormant partner may be held liable after he is discovered, although the acting partner, at the time of entering into the transaction, represented that there was no partnership, and, although the third party, at the time of the transaction, supposed that he was dealing with, and giving credit to, the ostensible partner as an individual.”

The same rule is expressed in 30 Amer. Juris., Joint Adventurers, § 41, as follows:

“. . . as a general rule, each of several joint adventurers has power to bind the others and to subject them to liability to third persons in matters which are strictly within the scope of the joint

enterprise. Thus a member of a joint adventure can bind his associates whether disclosed or undisclosed by such contracts as are reasonably necessary to carry on the venture."

The case of *O. K. Boiler & Welding Company v. Minnetonka Lumber Company*, 229 Pac. 1045, is a good illustration of the application of the rule. In that case it appeared that several parties entered into a joint adventure involving the construction of a building. The plaintiff lumber company subsequently delivered lumber to two of the joint venturers not knowing there were other parties to the joint adventure. Upon failure of the known joint adventurers to pay for the lumber delivered, the plaintiff lumber company filed a materialman's lien upon the premises jointly owned by the known and unknown joint adventurers. In affirming judgment in favor of the lumber company in its action to foreclose the lien, the court said at Page 1048:

"The action of Baker (one of the joint adventurers) in entering into contract bound all of the members of the joint adventure, whether known or unknown to the lien claimant."

Upon application of the foregoing rule of law to the facts of the present case, there can be no question as to the liability of the appellants, Goerig and Philp, as members of the joint venture, to appellee, Continental Casualty Company, under the indemnity provisions of the application for bond. Appellants, Goerig and

Philp, were members of the joint adventure, entered into for the specific purpose of performing contract with the United States. The securing of the bond was a condition precedent to the entering into and carrying out of said contract Specifications 1068 and 1062. The obtaining of such payment bond was reasonably necessary and was within the scope of the partnership business. The execution of the indemnity agreement was a condition precedent to obtaining the bond. When the joint adventure failed to pay the laborers and material men, the bond became liable and all members of the joint adventure, including appellants, Goerig and Philp, became liable over to Continental Casualty Company, not only under the provisions of the indemnity agreement, but on the application of the law of principal and surety.

A case very closely in point with the instant case is *State ex rel Crane Company v. Stokke*, 272 N. W. 811. In that case, Stokke and one Evans entered into a joint adventure to bid for the installation of an oil burner for the State of South Dakota. It was agreed between the joint adventurers that the bid would be made in the name of Stokke alone and that if they were successful, the contract would be taken only in Stokke's name. Their bid as made was successful and the contract was awarded to Stokke, but he was required to and did furnish a performance bond. The bond application



provided for the subrogation of the bonding company to all the rights of the principal. Upon default by Stokke in the payment of certain bills, the bonding company asserted its right to a state warrant payable to Stokke. This asserted right was contested by Evans, who claimed that, as a joint adventurer, he was entitled to one-half of that warrant and that Stokke was without authority to assign or dispose of Evans' interest in the state warrant. In holding that Evans was bound by the covenant made by Stokke for the purpose of obtaining the surety bond, the court said:

“It is the rule established by the great majority of decided cases that there is the same element of mutual agency in joint adventures as in partnerships, and that a member of a joint adventure can bind his associates whether disclosed or undisclosed (as can a partner) by such contracts as are reasonably necessary to carry out the venture. . . . Evans knew or is chargeable as a matter of law with knowing that Stokke could not enter into this oil burner contract with the State of South Dakota without putting up a surety bond to guarantee his performance thereof. Evans must be bound by any reasonable agreement that Stokke made for the purpose of securing a bond which was a requisite to enjoying the joint venture contract. Evans cannot claim the benefit of that bond and repudiate the covenants entered into by Stokke for the purpose of obtaining it . . . As joint adventurer or partner, he must bear the burden of the contract which Stokke made and which was reasonable and necessary for the furtherance of the joint enterprise.”



Appellants, Goerig and Philp, likewise cannot claim the benefit of the payment bond or repudiate the covenants of the indemnity agreement entered into by Joe Macri on behalf of the joint adventure for the purpose of obtaining it. When the bonding company, Continental Casualty Company, became liable to and did pay the laborers and materials, then each and all of the joint adventurers became liable to the bonding company under the provisions of the indemnity agreement, including appellants, Goerig and Philp.

**d. Answer to Contentions of Appellants**

Appellee's principal argument has been in connection with Specification 1068 in view of the fact that all of the judgments were rendered thereunder with the exception of the amount of \$919.97, which was rendered in connection with Specification 1062, in case No. 11726. The only difference in connection with Specification 1062 is that the contract, the bond and the bond application were all signed December 7, 1943, while the joint adventure agreement in connection with Specification 1062 was four days later on December 11, 1943. That situation is not true with reference to Specification 1068 where the joint venture agreement was signed almost five months prior to the signing of the contract, bond and bond application.

Appellants, therefore, contend that on December 7,

1943, when the bond and bond application were signed, there was no authority for the Macris to bind appellants, Goerig and Philp, to the indemnity agreement in connection with procuring a bond for Specification 1062.

Such specific authority need not be given. The rules of law above set forth are applicable. If the parties to the joint venture agreement were partners for the purpose of carrying out a contract with the United States, then all of the partners, including Goerig and Philp, as silent or undisclosed partners are liable in connection with all obligations arising therefrom so long as the same were reasonably necessary in the performance of the venture entered into.

If there was no authority at the time of the signing of said bond and bond application under Specification 1062, then the signing of the bond application and indemnity agreement was specifically ratified by all the co-partners four days later, on December 11, 1943, when the joint venture agreement was executed. The joint venture agreement executed four days later specifically authorizes the signing of such bond application and indemnity provisions and it will be noted that such joint venture agreement states that each party thereto shall be liable upon such bond, bond application and indemnity agreement, whether or not the same was

signed and executed prior to or after the execution of the joint venture agreement.

The execution of the joint venture agreement constitutes a specific ratification of the acts of the Macri partners in signing the bond and bond application on behalf of the members of the joint adventure. 40 Amer. Juris., "Partnership," Paragraph 156, Page 240, states:

"Ordinarily a partner has no implied authority to make contracts of guaranty or suretyship in the firm name. In order to make a contract of suretyship or guaranty executed by a partner binding on the other partners, or upon the partnership, authority for its execution must have been specially given or implied from the common course of the business of the firm, or from the previous course of dealings between the parties, *or have been afterward ratified by the co-partners.*"

On Specification 1068 there was specific authority given by joint venture agreement at time of signing. On Specification 1062 there was a specific ratification four days later by the signing of the joint venture agreement.

Appellants contend that the ordinary rule of partnership liability does not apply to indemnity agreements. Appellants contend that only the one partner executing the indemnity agreement is liable and that the other partners are not liable thereon. Appellants cite as authority for such rule the case of *Southern*

*Surety Co. v. Plott* (C. C. A. 4, 1928) 28 F.(2d) 698. The cited case was one of a contract required to be under seal by the laws of the state wherein the same was executed and in such case it was held that a person not signing the contract could not be bound. Such was merely the application of the simple rule of agency that the agent cannot bind the principal on a sealed instrument and that the parol evidence rule may not be violated to show such authority.

In the present case, there was no violation of the parol evidence rule to show the authority of the Macri partners to sign the bond application, since they had specific authority by virtue of the joint venture agreement wherein appellants, Goerig and Philp, specifically in writing authorized the execution of the bond application and indemnity agreement in Specification 1068 and specifically ratified the same in Specification 1062.

The evidence in the *Southern Surety Company* case, *supra*, discloses that the surety knew it was dealing with an agent and elected to write the bond on the credit of the agent alone without reference to the known principal. Again, such case has the application of the rule of agency that where third parties deal with an agent and know of the agency and elect to hold only the agent liable, then they cannot also hold the principal.

Such is not the case before the court where appellants, Goerig and Philp, were undisclosed or silent partners. Appellee, Continental Casualty Company, did not know of the existence of appellants, Goerig and Philp, at the time the bond and bond application were signed. Continental Casualty Company did not therefore elect to release or waive the right against known partners.

Likewise, the quotation on Page 16 of appellants' brief is not applicable as it specifically states therein that if a party is *informed* that the person with whom he is dealing is merely the agent for another and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal. Such a statement of law is not applicable to the present case where appellants, Goerig and Philp, were admittedly undisclosed, silent or dormant partners. Continental Casualty Company did not release or waive their rights against appellants, Goering or Philp, because they did not know of their existence until after the execution of the bond and indemnity agreement.

Appellants, Goerig and Philp, need not, individually, sign the bond application to be held liable thereon. Their grant of specific authority by execution of the joint venture agreement is sufficient to hold them liable to appellee, Continental Casualty Company. It is stated in 8 Amer. Juris., "Bonds," Sec. 10, Page 710:



“It is not necessary for the obligor to sign the instrument personally, unless otherwise provided by statute. Ordinarily, the signature of his agent or proxy is sufficient. The question as to whether or not a bond has in law been duly executed by the principal obligor or obligors when his signature or some of their signatures are absent from the foot of the instrument or present without authority is largely a factual one, to be decided in the light of all the surrounding facts and circumstances.”

Appellants, Goerig and Philp, contend that they are not liable to the bonding company in view of the fact that the so-called termination agreement was entered into prior to any of the Use Plaintiffs furnishing labor or material in the construction project. It is true that none of the Use Plaintiffs furnished any material or labor until after the execution of the so-called termination agreement, except the Use Plaintiff in Case No. 11723, which entered into a sub-contract on April 21, 1944, and delivered material between May 18, 1944, and October 15, 1945 (Tr. 11723-5 and 6).

The fact that no labor or material men furnished labor or material until after the execution of the so-called termination agreement in July, 1944, is immaterial insofar as the judgments of Continental Casualty Company against appellants, Goerig and Philp, are concerned.

Continental Casualty Company executed its bond in

connection with Specification 1062 on December 7, 1943, and in connection with Specification 1068 on May 18, 1944. Both bonds, immediately upon their execution, were delivered to the United States government as a condition prerequisite to the signing of the two contracts. Instantly upon execution of said bond and delivery to the United States, the appellee, Continental Casualty Company, became bound thereon and their liability was fixed. There was nothing that Continental Casualty Company could do to relieve themselves of the liability under such bond. The bonds were liable from that point forward to all laborers and materialmen who furnished or might furnish labor and materials to the project at any time in the future until the completion and termination of the contract. Insofar as Continental Casualty Company is concerned, it made no difference when the labor or material was furnished to the members of the joint adventure. Appellants, Goerig and Philp, gave no notice of their termination or attempted withdrawal from the joint venture relationship. The silent or dormant partners may not relieve themselves of liability by attempted withdrawal where no notice of such withdrawal is given. Likewise, a silent or dormant partner may not relieve himself of liability on obligations which have already become fixed, as has the bond in this case, by attempted withdrawal from the joint venture relationship.

The so-called termination agreement of July 15, 1944, should be examined by the court in connection with the attempted withdrawal from that relationship by appellants, Goerig and Philp. Under the wording of the joint venture agreement, appellants, Goerig and Philp, were entitled to share in the profits and were obligated to share likewise in the losses. The so-called termination agreement did not in reality or in fact or in law effect a termination of the joint venture agreement because by the wording of the termination agreement the appellants, Goerig and Philp, are entitled to any profits if profits are ultimately earned in connection with both Specification 1068 and Specification 1062 (Tr. 108). A portion of so-called termination agreement reads as follows (Tr. 110) :

“ . . . it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4) and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that *in reference to the first four contracts or projects referred to* here-inbefore, the contract with the owners were entered into by first party and that second parties did not appear herein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties

have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result 52 1-3% thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. *In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate."*

Appellants, Goerig and Philp, cannot successfully maintain that as to third parties they have withdrawn from the joint venture relationship and yet amongst themselves continue to own and be entitled to a percentage of the profits, if any there are. It is submitted that the so-called termination agreement is not a true termination, but that the parties continued on with the same division of profits and losses as set forth in the joint venture agreement.

Appellants next contend that, since the Use Plaintiffs did not recover against appellants, there is likewise no right of action by Continental Casualty Company against the appellants. That is, that since no acts of



appellants, Goerig and Philp, resulted in their liability to the Use Plaintiffs, there can be no recovery by Continental against appellants.

The reasoning of appellants in this respect is unsound for the following reasons: (1) Continental was held liable on its bond because of the actions of the joint adventure, including appellants, Goerig and Philp. The liability upon Continental's bond became fixed from the instant that it was executed. The bond was put up at the request of and under the specific provisions of the joint venture agreement. (2) Although it may be that appellants, Goerig and Philp, could withdraw from the joint adventure relationship as to Use Plaintiffs, who had not as yet furnished labor or material, still they could not withdraw as to Continental, whose bond and liability thereunder had already become fixed. (3) The liability of appellants, Goerig and Philp, is based upon the bond application and indemnity agreement which they specifically authorized and agreed to be held liable on by the specific provisions of the joint venture agreement. It is, therefore, immaterial whether or not Goerig and Philp are also liable to the Use Plaintiffs. It is submitted, however, that appellants, Goerig and Philp, are liable and should have been held liable by the trial court to each of the Use Plaintiffs because the so-called termination agreement was not effective as



such and they remained liable as silent or dormant partners with the Macri brothers.

In support of their contention that a surety may not recover over against an indemnitor whose acts have been held not to have caused the liability for which recovery has been had against the surety, appellants, Goerig and Philp, cite the case of *Seattle v. Ericksen*, 99 Wash. 543; 169 Pac. 985. That case is not an authority for the proposition for which it is cited for two reasons: (1) the case has been specifically overruled by the Supreme Court of the State of Washington in the case of *Alaska Steamship Company v. Sperry*, 107 Wash. 545; 182 Pac. 634; and (2) the *Ericksen* case and the two *Northern Pacific Railway Company* cases, cited by appellants, are personal injury cases and are based upon the theory of res adjudicata. These cases hold that where the injured party sues two persons, both of whom might be liable, and the court dismisses the action as against one party and holds the other party liable, the party who has been held liable cannot then recover over against the party who has in the first case been dismissed. This was the holding in *Seattle v. Ericksen*, *supra*, but such ruling was based upon the theory of res adjudicata. This proposition, however, has since been specifically overruled in the *Alaska Steamship Company* case, *supra*, and is not now the law in the State of Washington.

Appellants' contention that they are not liable to Continental because Goerig and Philp were not liable to the Use Plaintiffs is indeed a novel and ingenious contention, but the same is not the law with respect to partnerships or suretyship.

The same answer is applicable to the case which appellants have cited, *Town of Flagstaff v. Walsh* (C. C. A. 9, 1925) 9 F.(2d) 590. The *Flagstaff* case is likewise one of personal injury and cites the case of *Seattle v. Ericksen, supra*, which has been specifically overruled. Such cases are in no way applicable to the present case.

It is next contended by appellants that where parties enter into a contract for the benefit of a third party (joint venture agreement and indemnity agreement), they may determine or rescind such contract prior to the time the first party has accepted the contract or changed his position in reliance thereon. Appellee believes that the law of contract for the benefit of a third party is not applicable to the present case and it appears to us that the sole issue before the court is that of the liability of a principal who has specifically authorized his agent to execute a contract with a third party. The present case involves the application of the liability of a silent or dormant partner who has specifically authorized by execution of a joint venture

agreement the active partners to execute the necessary bond application to carry on the partnership business. The execution of the joint venture agreement specifically authorizing the obtaining of the bonds and signing of the indemnity agreements is no more an application of the law of third party beneficiary contracts than is ordinarily found in every partnership transaction. The every-day performance of business requires the active partners to enter into contracts and perform acts for which the partnership, including dormant or silent partners, are liable to third parties. The joint venture agreement in this case is specific evidence of the liability of each of the partners, including Goerig and Philp, wherein they each agree that they shall be liable upon any bond executed and any indemnity agreements required under the execution of the bond.

The rule contended for by appellants is not applicable in view of the fact that Continental immediately upon execution of the bond and delivery thereof to the United States changed its position and its liability became fixed and it could not release itself from the obligation under its bond.

In connection with case No. 11723, the trial court found that the Use Plaintiff entered into a sub-contract with the joint adventure and, consequently, gave judgment in favor of Use Plaintiff against not only the

Macri partners and Continental, but also appellants, Goerig and Philp. Such judgment is sustained by the findings and by the law of the case.

### CONCLUSION

We respectfully submit that the trial court was correct in its analysis of the facts and the application of the law thereto and that it correctly granted judgment over in favor of Continental Casualty Company against each of the joint adventurers, including appellants, Goerig and Philp. The judgment of the trial court should be affirmed.

Respectfully submitted,

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN  
WILLARD E. SKEEL,

*Attorneys for Appellee*

Office and Post Office Address:

914 Insurance Building

Seattle 4, Washington

No. 11727

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Appellant,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

FILED

NOV 12 1947

PAUL A. SPANIEL





No. 11727

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Appellant,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

---



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is **printed and cancelled** herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer and Counterclaim.....	10
Appeal:	
Appellant's Designation of Contents of Record on.....	65
Bond for Costs on Appeal.....	60
Clerk's Certificate to Transcript of Record on .....	376
Notice of.....	59
Statement of Points on Which Appellant Intends to Rely on.....	62
Stipulation as to Record to Be Printed on.	378
Appellant's Designation of Contents of Record on Appeal.....	65
Attorneys of Record.....	1
Bond for Costs on Appeal.....	60
Clerk's Certificate to Transcript of Record on Appeal .....	69
Complaint .....	2
Court's Oral Decision.....	339
Exhibits, Defendant's:	
A-1—Letter to Ohio Ferro-Alloy.....	349
A-2—Letter to City of Tacoma, Dated 12/7/45 .....	116
A-3—Letter to Ohio Ferro-Alloys Corp., Dated 9/14/45 .....	123

	INDEX	PAGE
Exhibits, Plaintiff's:		
1—Letter to City of Tacoma, Dated 8/21/45		97
2—Letter to R. L. Cunningham, Dated 10/13/45 .....		102
5—Contract Between City of Tacoma and Ohio Ferro-Alloys Corp.....		350
6—Letter to J. W. Weitzenkorn, Dated 10/4/41 .....		373
Findings of Fact and Conclusions of Law.....		41
Conclusions of Law.....		49
Findings of Fact.....		41
Journal Entry, Dated Feb. 4, 1947.....		13
Journal Entry, Dated Apr. 22, 1947.....		14
Journal Entry, Dated Apr. 23, 1947.....		15
Journal Entry, Dated Apr. 24, 1947.....		16
Journal Entry, Dated Apr. 29, 1947.....		22
Journal Entry, Dated May 2, 1947.....		23
Journal Entry, Dated June 30, 1947.....		40
Journal Entry, Dated July 7, 1947.....		57
Judgment .....		52
Motion for New Trial.....		55
Notice of Appeal.....		59
Order Denying Motion for New Trial.....		58
Order for Transmission of Original Exhibits..		68
Plaintiff's Proposed Findings of Fact and Con- clusions of Law with Plaintiff's Exceptions to Refusal.....		24
Conclusions of Law.....		31
Findings of Fact.....		24
Plaintiff's Proposed Judgment with Plaintiff's Exceptions to Refusal.....		37



INDEX	PAGE
Pre-Trial Order .....	17
Statement of Points on Which Appellant Intends to Rely.....	62
Statement of Points on Which Appellant Intends to Rely on Appeal.....	377
Stipulation as to Record to Be Printed on Appeal .....	378
Stipulation for Transmission of Original Exhibits .....	67
Transcript of Proceedings.....	71
Witnesses, Defendant's:	
Avrill, Leonard J.	
—direct .....	295
—cross .....	301
Kent, Verne	
—direct .....	314
—cross .....	322
—redirect .....	327
Klaben, Sam	
—direct .....	304
—cross .....	306
—redirect .....	308
McQuarrie, Robert	
—direct .....	308
—cross .....	314
Robinson, Louis H. B.	
—direct .....	284
—cross .....	292
—redirect .....	294
—recross .....	295

INDEX	PAGE
Witnesses, Plaintiff's:	
Arnold, Samuel III	
—direct .....	271
—cross .....	277
—redirect .....	282
Cunningham, R. L.	
—direct .....	95
—cross .....	110
—redirect .....	130
—recross .....	134
Farmer, Marvin	
—direct .....	211-329
—cross .....	218-331
—redirect .....	221-333
Jones, Robert R.	
—direct .....	221
—cross .....	247
O'Neil, R. D. (Deposition)	
—direct .....	153
—cross .....	175
—redirect .....	189
—recross .....	191
Pritz, William	
—direct .....	143-197
—cross .....	147-203
—redirect .....	209
—recross .....	210
Wietzenkorn, J. W.	
—direct .....	253
—cross .....	267

## ATTORNEYS OF RECORD

R. M. RYBOLT, ESQ.,

F. D. METZGER, ESQ.,

Tacoma Building, Tacoma, Washington,

Attorneys for Appellant.

DAY, COPE, KETTERER, RALEY & WRIGHT,

METZGER, BLAIR, GARDNER & BOLDT,

Tacoma Building, Tacoma, Washington,

Of Counsel for Appellant.

CLARENCE M. BOYLE, ESQ.,

Corporation Counsel, City of Tacoma,

City Hall, Tacoma, Washington,

Attorney for Appellee.

In the District Court of the United States, Western  
District of Washington, Southern Division

Civil Cause No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendant.

### COMPLAINT

Plaintiff, for its cause of action against the defendant, shows and alleges as follows:

#### I.

That plaintiff, The Ohio Ferro-Alloys Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Canton, in said State; that the defendant, City of Tacoma, is a municipal corporation of the State of Washington, situate in Pierce County in said State and within the Southern Division of the Western District of Washington. That the matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of \$3,000.00, and the above entitled Court has jurisdiction thereof under and

by virtue of Section 24 of the Judicial Code of the United States, as amended, Title 28 U.S.C.A., Section 41, and Section 274d of said Judicial Code, Title 28, U.S.C.A., Section 400.

## II.

That pursuant to Ordinance No. 11956 of said City of Tacoma, passed March 10, 1941, and entitled:

“An Ordinance authorizing the execution and delivery of a contract between the City of Tacoma, for and on behalf of its Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation, an Ohio corporation, for the sale of electric energy by the City to said corporation and fixing the terms and conditions of such contract,”

the parties hereto, under date of March 21, 1941, entered into a contract in writing, whereby the defendant City agreed to furnish and sell to plaintiff corporation, and plaintiff corporation agreed to purchase from defendant City, the electric power, exclusive of by-product power, required for the operation of a plant for the manufacture of electro-metalurgical products to be constructed, operated and maintained by plaintiff corporation in the City of Tacoma; that said contract is in full force and effect and by its terms will continue in effect until March 21, 1951; that a true copy thereof is hereto attached, marked Exhibit “A” and made a part hereof by this reference.



## III.

That in accordance with said contract, plaintiff completed construction of its plant in the City of Tacoma, and on or about July 7, 1941, commenced taking and has continuously since taken from the City of Tacoma the initial block of 6500 kilowatts of power known and designated as the "Contract demand." That as contemplated in the contract, plaintiff installed at its said plant a second electric furnace, and on or about November 3, 1941, and in accordance with the terms of said contract, commenced the taking of an additional block of 6000 kilowatts of electric power for the operation of said second furnace and continued to take such additional block of power without interruption until April 26, 1944.

## IV.

That on or about March 21, 1944, plaintiff having found that its operations would be interrupted and interfered with by orders of the War Production Board, an agency of the United States Government, removing ferro-chrome from its system of allocations and prohibiting the use of ferro-chrome in the manufacture of alloy steel, and having determined that because of said orders the operation of the second furnace would necessarily be temporarily suspended, notified the defendant City, under and pursuant to Article 19 of the contract, that for causes beyond plaintiff's control, to-wit, the orders of the War Production Board above referred to, the operation of the second furnace would be

temporarily suspended, but in such notification expressly denied that it was invoking its right under Article 10 of the contract temporarily to suspend the taking of said additional block (6000 kilowatts) of power. The defendant City, in response to such notice, denied that the proposed suspension was within the terms or governed by Article 19 of the contract but agreed that it was not under any other provisions of said contract, and offered that, without prejudice to plaintiff's claim that such suspension was one within and governed by Article 19, plaintiff might, independently and irrespective of the terms of the contract, suspend operation of the second furnace and the taking of the additional block of power on fifteen days' notice and that such suspension should continue subject to the delivery and taking of said additional block of power being resumed upon fifteen days' written notice given by either party to the other. Plaintiff accepted said offer, and in reliance thereon, on April 11, 1944, gave written notice that the operation of the second furnace would be temporarily suspended at midnight on April 26, 1944, at which time the furnishing and taking of the additional block of 6000 kilowatts of electric energy was discontinued.

#### V.

Thereafter and on February 26, 1945, plaintiff again placed its second furnace in operation and resumed the taking of the additional block of power, pursuant to and in reliance upon the City's offer and agreement pursuant to which the taking of said

additional block of power had been temporarily suspended on April 26, 1944, as hereinbefore alleged. Plaintiff continued the taking of said additional block of power until midnight of September 22, 1945, when, after due notice, it temporarily dropped said additional 6000 kilowatts of power pursuant to the right reserved to it in subdivision (a) of Article 10 of the contract.

## VI.

That subsequent to the dropping on September 22, 1945, of the additional block of power and up to and including the bill rendered for the month of February, 1946, the defendant City has billed plaintiff for electric energy furnished on the basis that the "contract demand" and the "billing demand" under the contract were 12,500 kilowatts. Plaintiff is advised and believes and therefore alleges the fact to be that upon the proper interpretation of the contract, in the light of the events which had happened, the correct contract and billing demand at all times subsequent to September 22, 1945, was 6500 kilowatts, and that accordingly the defendant City has billed plaintiff for \$44,013.69 in excess of the amount to which it is justly entitled for or on account of the electric energy used by the plaintiff from September 1, 1945, to February 28, 1946.

## VII.

That plaintiff, notwithstanding it believed and believes the bills rendered by the defendant City for the electric energy used by the plaintiff during the

six months September, 1945, to February, 1946, inclusive, were incorrect and largely in excess of the amounts rightfully due and owing from the plaintiff, has paid all of said bills under written protest and under business compulsion in order to avoid a termination of the contract and consequent forfeiture and delivery to the defendant City for the escrow fund established under and pursuant to Article 11 of the contract.

### VIII.

That in the future operation of its plant in the City of Tacoma during the unexpired term of the contract, plaintiff expects to be able and to desire to resume the operation of its second furnace, and for that purpose to request the defendant City to again supply the additional power required for the operation of that furnace, but that the length of time that the second furnace will remain in operation following such resumption will or may be uncertain, and the parties are now in dispute as to the period of time during which plaintiff will be required under the terms of Article 10 of the contract to pay for the energy used during or following any such resumption of taking of the additional block of power. The plaintiff asserts that the proper interpretation of all terms of the contract, including those contained in Article 10 thereof, is that after there was an initial user of the additional block of power for one year or more the plaintiff may discontinue the use of such additional block of power on appropriate notice to the

City of Tacoma without incurring any obligation to pay for<sup>4</sup> such additional block of power for any period of time beyond that covered by the actual user of such additional block of power. The City of Tacoma asserts that, in its interpretation of the contract, once the plaintiff has resumed the use of such additional block of power that it must continue to pay therefor for a minimum period of one year.

Wherefore, Plaintiff prays:

(1) That the Court declare the rights, obligations and other legal relations of the parties hereto in respect of the contract between them of March 21, 1941, and in so doing adjudge:

(a) That the suspension of the taking of the additional block of power which commenced in April, 1944, and continued until February, 1945, was under a special agreement between the parties hereto, and entirely outside the contract provisions, the validity of which the city is estopped to deny so that the period thereof is to be entirely disregarded in determining the applicable rates and the plaintiff's liability to the City for energy used after the termination of such suspension; or as a first alternative,

(b) That such suspension of the taking of the additional block of power commencing in April, 1944, and continuing until February, 1945, was for a cause beyond the control of the plaintiff within and under the terms and provisions of Article 19 of said contract; or as a second alternative,



(c) That such suspension was a temporary dropping of said additional block pursuant to the first paragraph of Article 10(a) of said contract, that the resumption of the taking of said additional block in February, 1945, was a second taking of said additional block pursuant to the second paragraph of Article 10(a) thereof, and that in determining the payment to be made therefor the contract demand was to be altered upward only during the continuance of said second taking.

(d) That under the terms and provisions of said contract and in the events which have happened, the correct billing demand for the energy furnished by the City of Tacoma and used by the plaintiff during the period from September 22, 1945, to February 26, 1946, was 6500 kilowatts.

(e) That by reason of the plaintiff's payment of the bills as rendered by the City for electric energy for the period commencing September 22, 1945, to and including February 26, 1946, the City has been unjustly enriched in the sum of \$44,013.69.

(f) That Article 10 of the contract taken together with all other terms thereof means that if the City, after appropriate notice and demand from the plaintiff, resumes delivery of the second or additional block of power the plaintiff may again and at any time after at least one month's notice suspend the taking thereof and shall be obligated to pay for the increase billing demand only during the time that such additional block of power continues to be delivered irrespective of the duration had of such resumed delivery.

(g) That in the event the Plaintiff again places its second furnace in operation and the City resumes the furnishing of the additional 6000 kilowatts in electric power required for the operation of said furnace, the billing demand shall be increased or altered upward only for the period during which such additional block of power is taken, irrespective of the length of that period.

(2) That the plaintiff have judgment against the City of Tacoma for the sum of \$44,013.69, together with interest at six per cent per annum upon the amounts and from the dates of the receipt by the City of the several amounts or payments making said \$44,013.69 and for its costs and disbursements to be taxed herein according to law.

F. D. METZGER.

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1946.

---

[Title of District Court and Cause.]

## ANSWER AND COUNTER-CLAIM

The defendant, answering the complaint of the plaintiff, shows and alleges as follows:

### I.

#### First Defense

The complaint fails to state a claim against defendant on which relief can be granted.

## Second Defense

## I.

Defendant admits the execution of the contract referred to in paragraph II of plaintiff's complaint, pursuant to Ordinance No. 11956, in substantially the form therein set forth, excepting that there is omitted in article 10 of said contract following the word "power" and before the word "referred" appearing on line 14, the following: "obligation for this additional block and will again supply the power." Defendant denies the remaining allegations contained in said paragraph.

## II.

Defendant denies the allegations contained in Paragraph IV of plaintiff's complaint, except it admits that subsequent to March 21, 1944, the plaintiff notified the defendant that it intended to temporarily suspend the operation of the second furnace, claiming the right to do so under article 19 of the contract and that the City denied that the proposed suspension was governed by article 19 and that without prejudice to the claims of either party agreed the plaintiff might suspend the taking of the additional 6000 kilowatt block of power and that the delivery and taking of the additional block of power should be resumed upon 15 days' written notice given by either party to the other and that on April 11, 1944, plaintiff gave written notice that the operation of the second furnace would be so suspended at midnight on April 26, 1944.

## III.

Defendant denies the allegations contained in paragraph V of plaintiff's complaint, except it admits that on February 26, 1945, plaintiff resumed the taking of the additional block of power which had been temporarily suspended on April 26, 1944.

## IV.

Defendant denies the allegations contained in paragraph VI of plaintiff's complaint, excepting it admits that it has billed the plaintiff for electric energy furnished up to and including bill rendered for the month of February, 1946, on the basis that the "contract demand" and the "billing demand" under the contract were 12,500 kilowatts.

## V.

Defendant denies the allegations contained in paragraph VII of plaintiff's complaint, except it admits that the plaintiff has paid all the bills rendered by the defendant during the six months, September, 1945, to February, 1946, under written protest.

HOWARD CAROTHERS,  
CLARENCE M. BOYLE,  
GEORGE F. ABEL,  
J. DEAN BARLINE,

Attorneys for Defendant.

Received copy of foregoing Answer this 20th day of September, 1946.

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23, 1946.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 4th day of February, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

\* \* \*

By direction of the court the following causes are set for trial on the dates indicated:

No. 914 Ohio Ferro-Alloys Corp. vs. City of Tacoma, set for trial April 22. F. D. Metzger represents the plaintiff and Howard Carothers represents the defendant.

\* \* \*



At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 22nd day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 22nd day of April, 1947, this cause comes on before the court for trial to the court. F. D. Metzger represents the plaintiff and Clarence Boyle and Howard Carothers represents the defendant. Case is called. Both sides ready. Trial is continued until 2 p.m. Wednesday.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 23rd day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 23rd day of April, 1947, in the above cause F. D. Metzger represents the plaintiff and Clarence Boyle represents the defendant. Cause is continued for trial until 10 a.m. Thursday.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 24th day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 24th day of April, 1947, this cause comes on before the court for trial to the court. F. D. Metzger represents the plaintiff and Clarence Boyle and Howard Carothers represents the defendant. Case is called. Both sides ready. Pre-trial order is signed by the court and filed. Mr. Metzger requests that Attorney R. M. Rybolt be permitted to participate in the trial. Request granted. Opening statement by Mr. Metzger and Mr. Boyle.

At 11:00 a.m. trial suspended. Ex parte matters heard. At 11:07 court recessed. At 11:20 a.m.

court is again in session. All parties present. Trial is resumed. Plaintiff Witness R. L. Cunningham sworn and testifies. Plaintiff Exhibits 1, 2 and 4 admitted. Defendant Exhibits A-1 and A-2 admitted.

At 12:05 p.m. court recessed until 1:45 p.m. At 1:45 p.m. court is again in session. All parties present. Trial is resumed. Plaintiff Witness R. L. Cunningham resumes the witness stand and further testifies. Defendant Exhibit A-3 admitted. Plaintiff Witness William Pritz sworn and testifies. Deposition of R. D. O'Neil read by Mr. Metzger and Mr. Ribault. Plaintiff Exhibits 5, 6, 7, 8, 9, 10, 11, and 12 admitted.

At 4:15 p.m. trial of this cause is continued until Tuesday, April 29, at 10:15 a.m.

---

[Title of District Court and Cause.]

### PRE-TRIAL ORDER

As a result of pre-trial conferences heretofore had, whereat the plaintiff was represented by F. D. Metzger, one of its attorneys, and the defendant was represented by Howard Carothers, Corporation Counsel, and Clarence M. Boyle, Assistant Corporation Counsel.

It Is Now and Hereby Ordered as follows:

1. This is an action brought by Ohio-Ferro-Alloys Corporation, an Ohio corporation, against the City of Tacoma, a municipal corporation of the

State of Washington, to recover an alleged overpayment aggregating in excess of \$3,000.00 made by the plaintiff to the defendant city upon bills rendered by said city to the plaintiff for amounts claimed by the city to be due under the term of a written contract between the parties, dated March 21, 1941, for the months of September, 1945, to and including February, 1946, and for a declaration, pursuant to Section 274 D of the Judicial Code of the United States, Title 28, U.S.C.A. Section 400, of the rights and obligations of the parties under said contract, with respect to payment for the second or additional block of 6,000 kw. of electrical energy if and when such additional block shall be supplied by the city.

2. It is admitted that the parties hereto, under date of March 21, 1941, duly entered into a contract in writing pursuant to Ordinance No. 11956 of the City of Tacoma, passed March 10, 1941, for the furnishing by the city and the taking by the plaintiff of the electrical energy required for the operation of a plant to be constructed and operated by the plaintiff in Tacoma; that with the addition or insertion of the words "obligation for this additional block and will again supply the power" following the word "power" and before the word "referred" in Line 17 of Article X of the contract, as set forth in Exhibit "A" to the plaintiff's complaint, said Exhibit "A" is a true and correct copy of said contract, which has been at all times since the date of its execution and now is in full force and effect.

3. It is admitted that in accordance with and



pursuant to said contract, plaintiff constructed the electrometallurgical plant contemplated by said contract and on or about July 7, 1941, commenced taking and has continually since taken from the defendant city the initial block of 6,500 kw. of electric energy, in said contract known and designated as the "contract demand;" and that on or about November 3, 1941, the defendant, in accordance with and pursuant to the terms of said contract, commenced the taking of the additional block of 6,000 kw. of electric energy and continued to take such additional block of power without interruption until April 26, 1944; that on April 26, 1944, plaintiff suspended the taking of said additional block of electric power pursuant to a special arrangement made between it and defendant city, as evidenced by the following correspondence, namely:

Letter of plaintiff to City of Tacoma, dated March 21, 1944.

Letter of defendant city, by R. D. O'Neil, its then Commissioner of Public Utilities, to plaintiff, dated March 29, 1944.

Letter and telegram of plaintiff to defendant city, dated April 8, 1944.

Letter of defendant city to plaintiff, dated April 11, 1944, and

Letters of plaintiff to City of Tacoma, dated April 22 and April 24, 1944.

That such arrangement and the suspension of taking of the second block of power was expressly

without prejudice to the plaintiff's claim that such suspension was caused by causes beyond its control, to-wit, certain orders of the War Production Board, and that under the rights reserved in such mutual arrangement, plaintiff has continued to assert and now asserts that such suspension of taking of the second block of power was occasioned by the cause or causes beyond its control above referred to and if not governed and excused by the aforesaid special arrangement, was governed and excused under the terms of Article XIX of said contract; that the furnishing and taking of said additional block of power was resumed by the parties on or about February 26, 1945; that written notice of the intended suspension of such taking was given by plaintiff to defendant city by letter dated August 21, 1945, but there is in dispute and for determination herein when, and whether after September 21, 1945 and prior to February 26, 1946, the taking of said second block of power was suspended. It is admitted that the actual maximum demand imposed by the plaintiff during October, 1945 was 11,988 kw., and during November, 1945 was 10,472 kw., and that after December 1, 1945, such maximum demand did not exceed 7,560 kw., but plaintiff contends that after November 24, 1945, such maximum demand did not exceed 6,500 kw.

4. That following September, 1945, the city continued to bill Ohio on the basis that the billing demand under the contract of March 21, 1941, con-

tinued to be 12,500 kw. until February 26, 1946. That Ohio has paid all bills as rendered, but under protest and under claim of business compulsion, and claims that under proper interpretation of the contract, billing demand should have been on November 24, 1945, reduced to 6,500 kw., and that because of the city's refusal to reduce said billing demand, contrary to the true intent and proper construction of said contract, plaintiff has overpaid defendant city the sum of \$27,041.10, for which it seeks refund herein. The city asserts that its bills were rendered in strict accordance with said contract, and that there is no refund due.

5. Plaintiff, in addition to seeking recovery of said alleged overpayment, seeks a judgment declaratory of the rights and obligations of the parties in respect to the amount payable under the contract if the furnishing and taking of the additional block of energy of 6,000 kw. should be hereafter resumed.

6. The city has waived and withdrawn its Third Defense and Counter Claim and the same, together with the plaintiff's Reply thereto, should be and are stricken.

Done in Open Court this 24th day of April, 1947.

/s/ CHARLES H. LEAVY,  
U. S. Dist. Judge.

O. K. Clarence M. Boyle of attorneys for defendant. F. D. Metzger of attorneys for plaintiff.

[Endorsed]: Filed April 24, 1947.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 29th day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

Now on this 29th day of April, 1947, this cause comes on before the court for further trial to the court. F. D. Metzger represents the plaintiff and Clarence Boyle and Howard Carothers represents the defendant. Plaintiff Witness William Pritz having been sworn resumes the witness stand and further testifies. Plaintiff Exhibit 3 admitted. Plaintiff Witnesses Murwin Farmin and Robert R. Jones sworn and testify.

At 12:15 p.m., court recessed until 2 p.m. At 2 p.m. court is again in session. Ex parte matters heard. Trial is resumed. All parties present. Plaintiff Witness Robert R. Jones resumes the witness

stand and further testifies. Plaintiff Exhibit 13 admitted. Plaintiff Witness J. W. Weitzenkorn sworn and testifies. Plaintiff Exhibits 14, 15 and 16 admitted.

At 3:20 p.m. court recessed. At 3:30 p.m. court is again in session. Trial is resumed. Plaintiff Witness Samuel Arnold III sworn and testifies. At 4 p.m. plaintiff rests. Defendant Witnesses R. H. B. Robinson, Leonard J. Averill, Sam Claben, Robert McQuarrie, Vern Kent, Murwin Farmin sworn and testify. Defendant Exhibit A-4 admitted.

At 5:25 both sides rest. Cause is continued until Friday, May 2 at 10 a.m. for argument.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 2nd day of May, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

Now on this 2nd day of May, 1947, the above cause comes on before the court for further trial. F. D.



Metzger represents the plaintiff and Clarence Boyle represents the defendant. Argument by Mr. Metzger and Mr. Boyle. The court now finds that the City of Tacoma was forewarned on Jan. 1, 1946 and must refund payment for the power used by the plaintiff for January and February, 1946 the amount to be determined by the city meter reading. At the resumption of power the plaintiff must pay for the 12-month period. Written Findings of Fact and Conclusions of Law to be presented later.

---

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore come on for trial before the undersigned, sitting without a jury, the plaintiff appeared by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant appearing by Howard Carothers, Corporation Counsel, and Clarence M. Boyle, Assistant Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the Court having heard and considered the argument of counsel, doth make the following.

### Findings of Fact

#### I.

The plaintiff, the Ohio Ferro-Alloys Corporation, is and at all times hereinafter mentioned was a corporation organized and existing under and by

virtue of the laws of the state of Ohio, having its principal place of business in the City of Canton in said state.

## II.

The defendant, the City of Tacoma, is and at all times hereinafter mentioned was a municipal corporation of the State of Washington, situate in Pierce County, in said state, and within the Southern Division of the Western District of Washington.

## III.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

## IV.

Under date of March 21, 1941, the parties hereto, pursuant to Ordinance No. 11956 of the defendant city, passed March 10, 1941, and entitled "An ordinance authorizing the execution and delivery of a contract between the City of Tacoma for and on behalf of its Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation, an Ohio corporation, for the sale of electric energy by the city to said corporation, fixing the terms and conditions of such contract," entered into a contract in writing, which is hereinafter referred to as "the contract", a copy of which is in evidence herein marked Plaintiff's Exhibit 5. Said contract has been at all times since and is now in full force and effect, and by its terms, will continue in effect for ten (10) years from the date of its execution.

## V.

In accordance with and pursuant to the contract, plaintiff constructed the electrometallurgical plant contemplated by the contract, and on or about July 7, 1941, commenced taking and continually since has taken from the defendant city the initial block of 6,500 kilowatts of electric energy in the contract known and designated as the "contract demand". On or about November 3, 1941, the plaintiff, in accordance with and pursuant to the terms of the contract, commenced the taking of the additional block of 6,000 kilowatts of electric energy and continued to take such additional block of power without interruption until April 26, 1944.

## VI.

That by letter dated March 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 7, plaintiff, because the operations of its work at its aforesaid electrometallurgical plant had been interrupted or interfered with by governmental regulations, orders or proclamations and particularly by Supplemental Order M-21-a, Direction 4 of the War Production Board of the United States, issued January 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 15, and by Direction 1 to General Preference Order M-18-a of said War Production Board, a copy of which is in evidence herein as Plaintiff's Exhibit 16, gave to the defendant city written notice of its intention to close down operations of its second furnace for reasons beyond its

control and within the scope and purview of Article 19 of the contract. Defendant city declined to admit or recognize that Article 19 of the contract was applicable, but because it was temporarily advantageous and beneficial to the city to reduce its then current sales of electric energy, offered that plaintiff might temporarily suspend the operation of or temporarily shut down its second furnace, subject to resumption of the operation thereof and of taking the required 6,000 kilowatts of electric energy therefor on thirty (30) days (later modified to fifteen days) notice from either party, but without being in any way penalized by such shut down and without prejudice to plaintiff's claims that the shut down of the second furnace and the suspension of the taking of the second block of electric energy was occasioned by causes beyond plaintiff's control and governed and excused by Article 19 of the contract.

## VII.

Plaintiff acted upon defendant's offer and pursuant thereto and in reliance thereon and by special arrangements made between it and defendant city, the plaintiff, on April 26, 1944, closed down the operation of its second furnace and suspended the taking of the second or additional block of power, and resumed the taking thereof on February 26, 1945. That such temporary suspension of the delivery and taking by the defendant city and the plaintiff, respectively, of said additional block of power was advantageous and beneficial to both of the parties hereto.

## VIII.

That under date of August 21, 1945, plaintiff gave to the defendant city written notice of its intention to suspend operation of the second furnace (Plaintiff's Exhibit 1) claiming the right so to do under Article 10 of the contract. That thereupon a dispute arose between the parties, defendant city claiming that notwithstanding the operation of said second furnace should be closed down pursuant to the notice given, plaintiff would continue liable to the city for electric energy on the basis of 12,500 kilowatts of billing demand until it had paid for the equivalent of one year's continuous taking from February 26, 1945 of the additional electric demand of 6,000 kilowatts, which is the load imposed by plaintiff's second furnace, and plaintiff claiming that upon the actual shut down of its second furnace, its liability to make further payments on account of the additional block of energy supplied for the second furnace's operation terminated.

## IX.

Plaintiff completely suspended the operation of its second furnace on November 24, 1945, but defendant city did not have notice of such shut down and consequent cessation of plaintiff's taking of the additional block of energy until December 31, 1945. Notwithstanding such shut down and cessation of taking of the second or additional block of power, the defendant city, in line with its contention above set out, continued to bill plaintiff monthly on the



basis that the billing demand under the contract remained 12,500 kilowatts until February 26, 1946, at which time the billing demand was reduced by the defendant city to 6,500 kilowatts. Plaintiff paid such bills under written protest and under business compulsion to avoid any claim of default which might threaten or result in the loss or forfeiture of the escrow fund which had been established pursuant to Article 11 of the contract. In accordance with the city's billing, plaintiff, on February 10, 1946, paid defendant city \$18,229.17 on the basis of 12,500 kilowatts of demand in January, 1946, and on March 11, 1946, paid the defendant city \$17,604.17 on the basis of 12,500 kilowatts of demand for the first twenty-six days of February, 1946, and of 6,500 kilowatts of demand for the last two days. The highest actual demand shown by the city's meters in January, 1946, was 7,404 kilowatts, and in February, 1946, was 6,300 kilowatts. The highest actual demand shown by plaintiff's meters did not exceed 6,500 kilowatts in either January or February, 1946. The actual amount due the defendant city from the plaintiff for January, 1946, was \$10,797.50, and for February, 1946, was \$9,479.17, and accordingly, plaintiff has overpaid defendant city the total sum of \$15,556.67.

## X.

The contract, Plaintiff's Exhibit 5, was drafted by the defendant city following negotiations between R. D. O'Neil, the then Commissioner of Public Utilities of the City of Tacoma, and representatives of

the plaintiff, and was intended to embody the mutual understanding and agreement reached by and as a result of such negotiations, but is ambiguous, uncertain and susceptible of more than one interpretation with respect to the rates or amounts to be paid by the plaintiff for the second or additional block of 6,000 kilowatts of electric energy in the event the furnishing of such load should be resumed by the defendant city following a suspension of the taking thereof by plaintiff under the right given by subdivision (a), captioned "For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts", of Article 10 of the contract. The mutual understanding and agreement between the said officer of the defendant city and the representatives of the plaintiff, on the basis of which the contract was made and entered into, was that the plaintiff, in addition to the initial block of 6,500 kilowatts of electric energy which the defendant city agreed to furnish and the plaintiff agreed to take for the term of ten years, should have the absolute right, upon giving six months written notice, to be furnished by the defendant city with a second block of 6,000 kilowatts of electric energy; that the plaintiff could drop or suspend the taking of this additional load whenever in its judgment it could not use the same upon giving at least one months written notice, subject to the condition that if the dropping or suspension of such additional load following the initial taking thereof occurred prior to the time that plaintiff had made twelve consecutive monthly payments therefor, plaintiff must

nevertheless continue to pay for the additional load until it had paid for a year's (twelve month's) taking thereof; in other words, that plaintiff's right to be furnished with the additional 6,000 kilowatt load in the first instance was upon the condition that plaintiff would in any event pay defendant city as for a full year's taking thereof; that if having once taken and dropped the additional load of 6,000 kilowatts, plaintiff should desire to resume the taking thereof, the city should have the sole decision as to whether it had surplus power available in sufficient quantity to supply that load, but that if the defendant city agreed to and did resume the furnishing of the additional load, then the plaintiff would not be required to take or pay for it for any particular length of time, but could again drop or suspend the taking thereof on thirty days written notice, and would be required to pay for it as energy used but only for the time that it was actually taken.

Dated this.....day of June, 1947.

.....  
Judge.

From the above and foregoing Findings of Fact, the Court makes the following:

#### Conclusions of Law

1. That this Court has jurisdiction of the parties hereto, and of the subject matter of the action, under Section 24 of the Judicial Code, Title 28, U.S.C.A., Section 41.

2. That the case is one of actual controversy, and the pleadings are appropriate for the Court to declare the rights, liabilities and other legal relations of the parties under the existing contract between them (Plaintiff's Exhibit 5 herein) under Section 274 d of the Judicial Code, Title 28, U.S.C.A., Section 400.

3. That the defendant city wrongfully demanded from the plaintiff excessive payments for and on account of electric energy furnished by the city to the plaintiff during January and February, 1946; plaintiff made the payments so demanded under protest and business compulsion, and accordingly, plaintiff is entitled to recover such excessive payments and to have and recover judgment against the defendant city therefor, to-wit:

For \$7,431.67, with interest at 6% per annum from February 10, 1946, and

For \$8,125.00, with like interest, from March 11, 1946.

4. That the contract, Plaintiff's Exhibit 5, having been drawn by the defendant city, is to be construed strictly against it and in the light of the circumstances leading to its execution, and conformably to the intent of the parties, Subdivision (a) of Article 10 of the contract is to be construed and interpreted and the rights, liabilities and legal rela-

tions of the parties are to be determined for all purposes as though said Subdivision (a) had been originally written and at all times read as follows:

“10. Alteration or Cancellation of Contract Demand:

“(a) For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts.

“The Corporation will be permitted on six (6) months written notice, at any time during the life of this contract, to increase its contract demand to supply one additional furnace using not to exceed six thousand (6,000) kilowatts of power. If, following the date of initial delivery of this additional block of power, conditions in the Corporation's business are depressed so that the Corporation, in its judgment, cannot use the additional power contracted for, the Corporation shall have the right, upon giving the City at least one (1) month's notice in writing, to drop this additional power. If the dropping of this additional block of power shall be after continuous use or taking thereof extending over one year or after use or taking thereof for periods aggregating one year and uninterrupted only by causes beyond control, as defined and provided for in the following Article 19 hereof, then payment for said 6,000 kilowatts of power for the time taken following such full year's billing shall be at the rate of \$17.50 per kilowatt



per year, but prorated according to the fractional part of the year during which said additional block is taken, as provided in Subparagraph (b-3) of Paragraph (b) of Article 4 hereof.

“In the event the Corporation elects to exercise its right of alteration, as provided for in this contract, and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City’s judgment, surplus power is available in sufficient quantity to meet the Corporation’s additional requirements. If and when the Corporation and the City so mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, to be altered downward only by the Corporation, upon at least one (1) month’s written notice to the City. If the furnishing of such additional block of power shall be resumed, the same shall be be furnished and paid for at the rate of \$17.50 per kilowatt per year, but if the taking thereof shall be for a part of a year only, or for a part of a year following one or more full years of continuous taking, then for the part of the year the additional block of power or load is furnished, the \$17.50 per kilowatt rate shall be prorated according to the fractional part of the

year during which said additional load is taken, so that payment shall be made only for the time the city is required to furnish said 6,000 kilowatt load.

“The Corporation may permanently drop its additional 6,000 kilowatt power requirements, at any time, after one year’s billing (12 consecutive months, at the specified rate. In the event the Corporation exercises this right of option, and the City is so notified in writing, the City may reclaim or salvage its equipment originally installed to serve the second furnace and its additional power requirements.

“If and when the Corporation should drop its additional 6,000 kilowatt requirements, either temporary or permanently, and if such dropping shall be after the Corporation shall have once made at least twelve (12) consecutive monthly payments at the \$17.50 per kilowatt annual rate for said 6,000 kilowatt load, then upon such dropping, the ‘ratchet’ clause specified under ‘Billing Demand’ will be dropped proportionately.”

5. The plaintiff is entitled to judgment and decree of this Court declaring the rights, liabilities and legal relations of the parties under the contract to be in accordance with the construction and interpretation of Subdivision (a) of Article 10 of the contract as set forth in the preceding paragraph hereof.

6. The plaintiff is entitled to have and recover judgment against the defendant city for its costs to be taxed herein according to law.

Done in Open Court this.....day of June, 1947.

.....  
Judge.

Presented by:

/s/ F. D. METZGER.

The foregoing Findings of Fact and Conclusions of Law were presented by F. D. Metzger on behalf of the Plaintiff and their adoption moved. Said Findings and Conclusions are disallowed and Exceptions to such disallowance are severally allowed particularly as to Findings IX and X and Conclusions 3, 4 and 5.

June 30, 1947.

/s/ CHAS. H. LEAVY,  
U. S. Dist. Judge.

[Endorsed]: Lodged Jan. 26, 1947.

In the District Court of the United States, Western  
District of Washington, Southern Division

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

### JUDGMENT

This cause having heretofore come on for trial before the undersigned judge of the above entitled court, sitting without a jury, the plaintiff, The Ohio Ferro-Alloys Corporation, appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant, City of Tacoma, appearing by Howard Carothers, then Corporation Counsel, and Clarence M. Boyle, then Assistant Corporation Counsel, now Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the court having heard and considered the argument of counsel and having heretofore made and entered its Findings of Fact and Conclusions of Law, does now and hereby

Order, Adjudge and Decree that plaintiff, The Ohio Ferro-Alloys Corporation, do have and recover judgment against and from the defendant,

City of Tacoma, a municipal corporation of the State of Washington, in the sum of \$15,556.67, together with interest at the rate of six per cent per annum on \$7,431.67 from February 10, 1946, until paid, and on \$8,125.00 from March 11, 1946, until paid, and for its costs and disbursements to be taxed herein according to law.

It Is Further Ordered, Adjudged and Decreed and the court does declare that the rights, liabilities and other legal relations of the parties hereto under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6,000 kilowatts of electric energy are as follows:

If the plaintiff, in said contract of March 21, 1941, and hereinafter called "The Corporation," shall make written request upon the defendant, in said contract and hereinafter called "The City," to resume delivery or again supply said additional block of 6,000 kilowatts of power, and if, upon or following such request, the City, in its judgment, shall determine that it then had surplus power available in sufficient quantity to supply said additional block of power, then the Corporation has the right to be supplied with and the City is obligated and required to again deliver the additional block of 6,000 kilowatts of electric energy upon a firm power basis, and the Corporation is required and obligated to take and pay for said additional block of power at the rate of Seventeen and 50/100 Dollars (\$17.50) net per year per kilowatt of billing demand, payable monthly on the basis of one-



twelfth (1/12) of the annual rate, subject, however, to the Corporation's right to drop or suspend the taking of such additional power at any time upon at least one (1) month's written notice. If the Corporation's taking of such additional load or block of power is for part of a year only or for part of a year following one or more full years taking, then for such part or fraction of a year's taking, the annual Seventeen and 50/100 Dollars (\$17.50) per kilowatt rate shall be prorated so that plaintiff shall, in respect of any taking of said additional block of power for part of a year only, pay therefor that percentage of the annual rate which the part of the year during which said additional load is taken is of a full year.

Done in open court this . . . . day of June, 1947.

.....

Judge.

Presented by:

/s/ F. D. METZGER.

The foregoing judgment was presented and its entry moved by F. D. Metzger on behalf of the Plaintiff. Such judgment was disallowed and exception allowed Plaintiff.

June 30, 1947.

/s/ CHAS. H. LEAVY,

Judge.

[Endorsed]: Lodged June 26, 1947.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 30th day of June, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

Now on this 30th day of June, 1947, this cause comes on before the court for presentation of Findings of Fact and Conclusions of Law. F. D. Metzger represents the plaintiff and Clarence M. Boyle represents the defendant. Remarks by Mr. Metzger and Mr. Boyle. Mr. Metzger requests an exception to Findings of Fact Nos. 9 and 10 and to Conclusions of Law Nos. 3, 4 and 5. Exceptions allowed by the court. Findings of Fact and Conclusions of Law and Judgment is now signed by the court and filed.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore come on for trial before the undersigned, sitting without a jury, the plaintiff appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant appearing by Howard Carothers, Corporation Counsel, and Clarence M. Boyle, Assistant Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the Court having heard and considered the argument of counsel, doth make the following

### Findings of Fact

#### I.

The plaintiff, the Ohio Ferro-Alloys Corporation, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Canton in said state.

#### II.

The defendant, the City of Tacoma, is and at all times hereinafter mentioned was a municipal corporation of the State of Washington, situate in Pierce County, in said state, and within the Southern Division of the Western District of Washington.

## III.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3000.00.

## IV.

Under date of March 21, 1941, the parties hereto, pursuant to Ordinance No. 11956 of the defendant city, passed March 10, 1941, and entitled "An ordinance authorizing the execution and delivery of a contract between the City of Tacoma for and on behalf of its Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation, an Ohio corporation, for the sale of electric energy by the city to said corporation, fixing the terms and conditions of such contract," entered into a contract in writing, which is hereinafter referred to as "the contract," a copy of which is in evidence herein marked Plaintiff's Exhibit 5. Said contract has been at all times since and is now in full force and effect, and by its terms, will continue in effect for ten (10) years from the date of its execution.

## V.

In accordance with and pursuant to the contract, plaintiff constructed the electrometallurgical plant contemplated by the contract, and on or about July 7, 1941, commenced taking and continually since has taken from the defendant city the initial block of 6,500 kilowatts of electric energy in the contract known and designated as the "contract demand." On or about November 3, 1941, the plaintiff, in

accordance with and pursuant to the terms of the contract, commenced the taking of the additional block of 6,000 kilowatts of electric energy and continued to take such additional block of power without interruption until April 26, 1944.

## VI.

That by letter dated March 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 7, plaintiff, claiming the operations of its work at its aforesaid electrometallurgical plant had been interrupted or interfered with by governmental regulations, orders or proclamations and particularly by Supplemental Order M-21-a, Direction 4 of the War Production Board of the United States, issued January 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 15, and by Direction 1 to General Preference Order M-18-a of said War Production Board, a copy of which is in evidence herein as Plaintiff's Exhibit 16, gave to the defendant city written notice of its intention to close down operations of its second furnace for reasons beyond its control and within the scope and purview of Article 19 of the contract. Defendant city declined to admit or recognize that Article 19 of the contract was applicable, but because it was temporarily advantageous and beneficial to the city to reduce its then current sales of electric energy, offered that plaintiff might temporarily suspend the operation of or temporarily shut down its second furnace, subject to resumption of the operation



thereof and of taking the required 6,000 kilowatts of electric energy therefor on thirty (30) days (later modified to fifteen days) notice from either party, but without being in any way penalized by such shutdown and without prejudice to plaintiff's claims that the shutdown of the second furnace and the suspension of the taking of the second block of electric energy was occasioned by causes beyond plaintiff's control and governed and excused by Article 19 of the contract.

## VII.

Plaintiff acted upon defendant's offer and pursuant thereto and in reliance thereon and by special arrangements made between it and defendant city, as evidenced by the following correspondence, namely:

Letter of plaintiff to City of Tacoma, dated March 21, 1944, Plaintiff's Exhibit 7.

Letter of defendant city, by R. D. O'Neil, its then Commissioner of Public Utilities, to the plaintiff, dated March 29, 1944, Plaintiff's Exhibit 8.

Telegram and letter of plaintiff to defendant, dated April 8, 1944, Plaintiff's Exhibits 9 and 10.

Letter of defendant city to plaintiff, dated April 11, 1944, Plaintiff's Exhibit 11, and

Letters of plaintiff to City of Tacoma, dated April 22 and April 24, 1944, respectively, Plaintiff's Exhibits 12 and 14,

on April 26, 1944, the plaintiff closed down the operation of its second furnace and suspended the taking of the second or additional block of power, and resumed the taking thereof on February 26, 1945. That such temporary suspension of the delivery and taking by the defendant city and the plaintiff, respectively, of said additional block of power was advantageous and beneficial to both of the parties hereto.

### VIII.

That under date of August 21, 1945, plaintiff gave to the defendant city written notice of its intention to suspend operation of the second furnace (Plaintiff's Exhibit 1) claiming the right so to do under Article 10 of the contract. That thereupon a dispute arose between the parties, defendant city claiming that notwithstanding the operation of said second furnace should be closed down pursuant to the notice given, plaintiff would continue liable to the city for electric energy on the basis of 12,500 kilowatts of billing demand until it had paid for the equivalent of one year's continuous taking from February 26, 1945, of the additional electric demand of 6,000 kilowatts, which is the load imposed by plaintiff's second furnace, and plaintiff claiming that upon the actual shutdown of its second furnace, its liability to make further payments on account of the additional block of energy supplied for the second furnace's operation terminated.

## IX.

Plaintiff completely suspended the operation of its second furnace on November 24, 1945, but defendant city did not have notice of such shutdown and consequent cessation of plaintiff's taking of the additional block of energy until December 31, 1945. Notwithstanding such shutdown and cessation of taking of the second or additional block of power, the defendant city, in line with its contention above set out, continued to bill plaintiff monthly on the basis that the billing demand under the contract remained 12,500 kilowatts until February 26, 1946. Plaintiff paid such bills under written protest and under business compulsion to avoid any claim of default which might threaten or result in the loss or forfeiture of the escrow fund which had been established pursuant to Article 11 of the contract. In accordance with the city's billing, plaintiff, on February 10, 1946, paid defendant city \$18,229.17 on the basis of 12,500 kilowatts of demand in January, 1946, and on March 11, 1946, paid the defendant city \$17,604.17 on the basis of 12,500 kilowatts of demand for the first twenty-six days of February, 1946, and of 6,500 kilowatts of demand for the last two days. The highest actual demand occurring subsequent to December 31, 1945, during the months of January and February, 1946, was 7404 kilowatts, which demand was established in the month of January, 1946; that in accordance with paragraph 7 of the contract (Plaintiff's Exhibit 5) which provides that the billing demand for any month shall not be less than the highest actual

demand which occurred during the immediately preceding eleven months, except as specified to the contrary under "Alteration or Cancellation of Contract Demand," the billing demand for each of the months of January and February, 1947, was thereby established as 7404 kilowatts. The actual amount due the defendant city from the plaintiff for January 1946, was \$10,797.50, and for February, 1946, \$10,797.50, and accordingly the plaintiff has overpaid defendant city the total sum of \$14,238.34 on account of said payments.

## X.

The contract, Plaintiff's Exhibit 5, was drafted by the defendant city following negotiations between R. D. O'Neil, the then Commissioner of Public Utilities of the City of Tacoma, and other representatives of the City of Tacoma, and representatives of the plaintiff and was intended to embrace the mutual understanding and agreement reached by and as a result of such negotiations and is unambiguous and certain and susceptible to only one interpretation with respect to the rates or amounts to be paid by the plaintiff for the second or additional block of 6,000 kilowatts of electrical energy in the event the furnishing of such load should be resumed by the defendant city following a suspension of the taking thereof by plaintiff under the right given by subdivision (a), captioned "For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts," of

Article 10 of the contract. The true intent of said agreement and of said contract was that the plaintiff, in addition to the initial block of 6,500 kilowatts of electric energy which the defendant city agreed to furnish and the plaintiff agreed to take for the term of ten years, should have the absolute right, upon giving six months written notice, to be furnished by the defendant city by a second block of 6,000 kilowatts of electric energy, that the plaintiff could drop or suspend the taking of this additional load whenever in its judgment it could not use the same upon giving at least one month's written notice, subject to the condition that if the dropping or suspension of such additional load following the initial taking thereof or following any subsequent new taking thereof, occurred prior to a time that plaintiff had made twelve consecutive monthly payments therefor immediately preceding the dropping or suspension of such additional load, plaintiff must nevertheless continue to pay for the additional load until it had paid for a year's (twelve months') taking thereof immediately preceding the dropping or suspension thereof. In other words, that the plaintiff's right to be furnished with the additional 6,000 kilowatt load was upon the condition that in the event plaintiff would pay the city for a full year's taking thereof following the initial taking and following any subsequent taking where said load had been discontinued subsequent to the initial taking and that if, after having once taken and dropped said additional load the plaintiff



should desire to resume the taking thereof, the city should have the sole decision as to whether it had sufficient surplus power to supply that load.

Dated this 30th day of June, 1947.

CHARLES H. LEAVY,  
U. S. District Judge.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

1. That this Court has jurisdiction of the parties hereto, and of the subject matter of the action, under Section 24 of the Judicial Code, Title 28, U.S.C.A., Section 41.

2. That the case is one of actual controversy, and the pleadings are appropriate for the Court to declare the rights, liabilities and other legal relations of the parties under the existing contract between them (Plaintiff's Exhibit 5 herein) under Section 274d of the Judicial Code, Title 28, U.S. C.A., Section 400.

3. That the defendant city wrongfully demanded from the plaintiff excessive payments for and on account of electric energy furnished by the city to the plaintiff during January and February, 1946; plaintiff made the payments so demanded under protest and business compulsion, and accordingly, plaintiff is entitled to recover such excessive pay-

ments and to have to recover judgment against the defendant city therefor, to-wit:

For \$7,431.67, with interest at 6% per annum from February 10, 1946, and

For \$6,806.67, with like interest, from March 11, 1946.

4. That said judgment provide that the correct billing demand under said contract up to and including December 31, 1945, was 12,500 kilowatts; that on said date the plaintiff discontinued the second or 6,000 kilowatt block of power mentioned in said contract; that in January, 1946, the actual demand under the contract for the initial 6,500 kilowatt block of power was 7404 kilowatts and that in determining the payment to be made under the terms of the contract for January and February, 1946, the contract demand remained at 7404 kilowatts and that the correct billing demand for each of said months was 7404 kilowatts.

5. That said judgment further provide that Article 10 of the contract, taken together with all other terms thereof, be construed to mean that if the defendant, after appropriate notice and demand from the plaintiff, resumes delivery of the second or additional block of power and the plaintiff thereafter again suspends the taking of said additional block within one year of such resumption, the plaintiff shall be obligated to pay for the increased load for one full year from the date of such resumption of its taking and that at any time or

times the taking of such additional block of power is resumed after suspension thereof, except for a suspension occurring under the provisions of Article 19 of said contract, payment for energy shall be on an annual basis at the contract demand of 12,500 kilowatts or the billing demand, whichever is greater, unless such suspension occurs after a year's continuous billing and payment therefor under a contract demand of 12,500 kilowatts immediately preceding the suspension.

6. That the plaintiff is entitled to have and recover judgment against the defendant city for its costs herein taxed according to law.

Done in open Court this 30th day of June, 1947.

CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

CLARENCE M. BOYLE,  
Of attorneys for Defendant.

[Endorsed]: Filed June 30, 1947.

In the District Court of the United States, Western  
District of Washington, Southern Division

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

### JUDGMENT

This cause having heretofore come on for trial before the undersigned judge of the above entitled court, sitting without a jury, the plaintiff, The Ohio Ferro-Alloys Corporation, appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant, City of Tacoma, appearing by Howard Carothers, then Corporation Counsel, and Clarence M. Boyle, then Assistant Corporation Counsel, now Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the court having heard and considered the argument of counsel and having heretofore made and entered its Findings of Fact and Conclusions of Law, does now and hereby

Order, Adjudge and Decree that plaintiff, The Ohio Ferro-Alloys Corporation, do have and recover judgment against and from the defendant,

City of Tacoma, a municipal corporation of the State of Washington, in the sum of \$14,238.34, together with interest at the rate of six per cent per annum on \$7,431.67 from February 10, 1946, until paid, and on \$6,806.67 from March 11, 1946, until paid, and for its costs and disbursements to be taxed herein according to law, said amounts being the amount overpaid by the plaintiff to the defendant under the contract hereinafter referred to up to and including February, 1946.

It Is Further Ordered, Adjudged and Decreed and the court does hereby declare that the rights, liabilities and other legal relations of the parties hereto under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6,000 kilowatts of electric energy are as follows:

If the plaintiff, in said contract of March 21, 1941, and hereinafter called "The Corporation," shall make written request upon the defendant, in said contract and hereinafter called "The City," to resume delivery or again supply said additional block of 6,000 kilowatts of power, and if, upon or following such request, the City, in its sole judgment, shall determine that it then had surplus power available in sufficient quantity to supply said additional block of power, then the Corporation has the right to be supplied with and the City is obligated and required to again deliver the additional block of 6,000 kilowatts of electric energy upon a firm power basis, and the Corporation is



required and obligated to take and pay for said additional block of power at the annual rate of Seventeen and 50/100 Dollars (\$17.50) net per year per kilowatt of billing demand, payable monthly on the basis of one-twelfth ( $1/12$ ) of the annual rate, subject, however, to the Corporation's right to drop or suspend the taking of such additional power at any time upon at least one (1) month's written notice; provided that payment therefor shall be made for at least one year from the resumption of the taking of such additional power; and provided further that if the Corporation's taking of such additional load or block of power is for part of a year immediately following one or more full year's taking immediately preceding the dropping or suspension of the taking of said additional block, then and for such part or fraction of a year's taking the annual \$17.50 per kilowatt rate shall be prorated so that plaintiff shall in respect of any taking of said additional block of power for part of a year following twelve months or more taking of said additional block of power immediately preceding such dropping or suspension, pay therefor that percentage of the annual rate which the part of the year during which said additional load is taken, is of a full year.

It Is Further Ordered, Adjudged and Decreed that the taking of said additional block of 6,000 kilowatts of power, commenced on February 26, 1945, was discontinued on the 31st day of December, 1945, and that there was established as the billing demand for the initial or 6,500 kilowatt load

in the month of January, 1946, a billing demand of 7404 kilowatts, which billing demand, under the terms of the contract, is the correct billing demand for the months of January and of February, 1946.

Done in open Court this 30th day of June, 1947.

/s/ CHAS. H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ CLARENCE M. BOYLE,  
Of Attorneys for Defendant.

[Endorsed]: Filed June 30, 1947.

---

[Title of District Court and Cause.]

### MOTION FOR A NEW TRIAL

Comes now the plaintiff, by his undersigned attorneys of record, and moves the court to set aside the judgment entered herein on June 30, 1947, and grant a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify:

(a) So much of the Court's Finding No. IX as finds that the billing demand for February, 1947, was 7404 kilowatts or any amount in excess of 6500 kilowatts; as finds that the amount actually due to the defendant City of Tacoma from the plaintiff was \$10,797.50, or any amount in excess of \$9,479.17; and so much as finds that the plaintiff has overpaid the defendant city the total sum of \$14,238.34 or any amount less than \$15,556.67;

(b) The whole and each and every part of the Court's Finding No. X.

2. Error in law occurring at the trial, in the following respects:

(a) Error in making and entering so much of Conclusion of Law No. 3 as provides that the plaintiff is entitled to recover judgment against the defendant City for but \$6806.67 on account of plaintiff's overpayment for the month of February, 1946, instead of \$8,125.00;

(b) In making and entering its Conclusion of Law No. 4 and so much thereof as finds that the correct billing demand for February, 1946, was 7404 kilowatts;

(c) In making and entering its Conclusion of Law No. 5 and the whole and each and every part thereof;

(d) In making and entering its judgment, and particularly those portions thereof which (a) limit the plaintiff's recovery on account of its overpayment for the month of February, 1946, to \$6808.67, with interest at six per cent per annum from March 11, 1946, until paid; (b) which declares the rights, liabilities and other legal relations of the parties under the contract between them dated March 21, 1941, in respect of the resumption and delivering and taking of the additional 6000 kilowatts of electrical energy; and (c) which decrees that the correct billing demand for the month of February, 1946, was 7404 kilowatts.

F. D. METZGER,

Of Metzger, Blair, Gardner & Boldt, Attorneys for Plaintiff.

Copy received July 1, 1947.

/s/ CLARENCE M. BOYLE,  
Of Attys. for Defendant.

[Endorsed]: Filed July 1, 1947.

---

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 7th day of July, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 7th day of July, 1947, this cause comes on before the court for hearing on motion for new trial. J. Dean Barline and Clarence Boyle attorneys representing the defendant present an order denying motion for new trial, which is signed by the court and filed.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR  
NEW TRIAL

Plaintiff's motion for a new trial in the above entitled cause having been regularly brought on for hearing on the . . . . day of July, 1947, before the Honorable Chas. H. Leavy, Judge of the above entitled Court, the Court having fully considered the same and being advised in the premises and it appearing to the Court that said motion is not well taken and should be denied, Now, Therefore, it is hereby

Ordered that plaintiff's motion for a new trial be and the same hereby is denied, to all of which the plaintiff excepts and exception allowed.

Dated this 7th day of July, 1947.

CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ CLARENCE M. BOYLE,  
/s/ J. DEAN BARLINE,  
Of Attorneys for Defendant.

Copy received and form approved for entry, July 31, 1947.

F. D. METZGER,  
Of Attys. for Plaintiff.

[Endorsed]: Filed July 7, 1947.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Ohio Ferro-Alloys Corporation, an Ohio corporation, plaintiff in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment made and entered in the above-entitled court and cause on June 30, 1947, and particularly from that part thereof wherein and whereby the above named District Court declares the rights, liabilities and other legal relations of the parties to the action under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6000 kilowatts of electric energy.

Dated at Tacoma, Washington, this 29th day of July, 1947.

F. D. METZGER,

R. M. RYBOLT,

Attorneys for Appellant.

DAY, COPE, KETTERER,

RALEY & WRIGHT,

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

Copy of the within and foregoing Notice of Appeal mailed to Corporation Counsel, City of Tacoma, City Hall, Tacoma, Washington, this 30th day of July, 1947.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, The Ohio Ferro-Alloys Corporation, an Ohio corporation, plaintiff herein, as Principal, and Hartford Accident and Indemnity Company, a corporation organized under the laws of the State of Connecticut and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto City of Tacoma, defendant herein, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) lawful money of the United States, for the payment of which sum well and truly to be made to said Defendant we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that Whereas the judgment of the above entitled Court was made and entered in the above entitled cause, on June 30, 1947, and said The Ohio Ferro-Alloys Corporation is about to file with said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and particularly from that part thereof wherein and whereby said District Court declares the rights, liabilities and other legal relations of the parties to the action under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6000 kilowatts of electric energy;

Now, Therefore, the condition of this obligation is such that if said The Ohio Ferro-Alloys Corporation shall pay all costs if said appeal is dismissed or said judgment affirmed or such costs as the appellate court may award if said judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the above bounden principal and surety have executed the foregoing bond this 29th day of July, 1947.

THE OHIO FERRO-ALLOYS  
CORPORATION.

By F. D. METZGER,  
R. M. RYBOLT,  
Its Attorneys of Record.

HARTFORD ACCIDENT AND  
INDEMNITY COMPANY.

[Seal] By /s/ HAROLD N. MANN,  
Its Attorney in Fact.

State of Washington,  
County of Pierce—ss.

On this 29th day of July, 1947, personally appeared before me Harold N. Mann, to me known to be the Attorney-in-Fact of Hartford Accident and Indemnity Company, the corporation that executed the within and foregoing instrument, as surety, and acknowledged said instrument to be the free and

voluntary act and deed of said Hartford Accident and Indemnity Company for the uses and purposes therein mentioned and on oath stated that he was authorized to execute the same for and on behalf of said corporation, and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ VIVIAN PARENT,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: Filed July 29, 1947.

---

[Title of District Court and Cause.]

### STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Comes now the Appellant, The Ohio Ferro-Alloys Corporation, and states that on the appeal of the above-entitled cause it intends to rely on the following points:

1. That the contract between the parties, dated March 21, 1941 (Plaintiff's Exhibit 5 herein), is ambiguous and uncertain and, having been drawn by the defendant City, is to be construed strictly against it. In the light of the circumstances leading to its execution and to conform to the intent of the

parties in making and entering into such contract, the provisions of said contract (particularly the provisions of subdivision (a) of Article 10 thereof) dealing with a resumption of delivery and taking of the additional block of 6000 kilowatts of electric energy should be interpreted and construed to mean and provide that in the events which had happened prior to the commencement of the action, if following a written request by the plaintiff upon the defendant to resume delivery or again supply said additional block of 6000 kilowatts of electric energy, the defendant city in its sole judgment shall determine that it then has surplus power available in sufficient quantity to supply said additional block of power, then the plaintiff corporation has the right to be supplied with and the City is obligated and required to again deliver said additional block of 6000 kilowatts of electric energy upon a firm power basis; and plaintiff corporation is required and obligated to take and pay for said additional block of power at the annual rate of \$17.50 net per year per kilowatt of billing demand, payable monthly on the basis of one-twelfth of the annual rate; provided, however, that plaintiff corporation has the right to drop or suspend the taking of such additional power at any time following the resumption of the delivery thereof, upon at least one month's written notice, and if the resumed delivery and taking of said additional block of power shall be for part of a year only, i.e., for less than twelve



calendar months' continuous taking or for part of a year following a full year's taking, then and for such part or fraction of a year's taking the annual \$17.50 per kilowatt rate shall be prorated so that the plaintiff in respect of any taking of said additional block of power for any such part or fraction of a year shall pay therefor that percentage of the annual rate which the part of the year during which said additional load is taken is of a full year.

2. The District Court erred in holding and declaring that if a resumed taking of the additional load of 6000 kilowatts of electric energy was for less than twelve consecutive months, i.e., for part of a year only, the plaintiff was nevertheless required to pay therefor the full annual rate as for a full year's taking.

Dated this 8th day of August, 1947.

F. D. METZGER,

R. M. RYBOLT,

Attorneys for Appellant.

DAY, COPE, KETTERER,

RALEY & WRIGHT,

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

[Endorsed]: Filed Aug. 8, 1947.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

Appellant, The Ohio Ferro-Alloys Corporation, hereby designates the following as the portions of the record, proceedings and evidence in this cause to be contained in the record on appeal, namely:

1. The original complaint, filed July 16, 1946.
2. Defendant's answer and cross-complaint, filed September 23, 1946.
3. Plaintiff's reply, filed March 21, 1947.
4. Plaintiff's request for admissions, filed April 18, 1947.
5. Pre-trial order entered April 24, 1947.
6. Reporter's transcript of the evidence and proceedings taken and had at the trial and hearings of this action, on April 24 and 29 and May 2, 1947, two copies of which transcript are filed herewith.
7. Oral decision of the United States District Judge, rendered May 2, 1947, if such decision is not included in the Reporter's transcript of the evidence.
8. Plaintiff's proposed findings of fact and conclusions of law and judgment, with all plaintiff's exceptions to the disallowance thereof.
9. Court's findings of fact and conclusions of law, with all exceptions taken by plaintiff thereto.
10. Court's judgment made and entered June 30, 1947, with all plaintiff's exceptions thereto.
11. Plaintiff's motion for new trial, filed July 1, 1947.

Order denying motion for new trial, entered July 7, 1947.

13. All Clerk's journal entries relative to proceedings had and judgments made and entered in the above entitled cause, including but not limited to the journal entries for the following dates: February 4, 1947; April 22, 1947; April 23, 1947; April 24, 1947; April 29, 1947; May 2, 1947; June 30, 1947, and July 7, 1947.

14. Notice of appeal, filed July 29, 1947.

15. Bond for costs on appeal, filed July 29, 1947.

16. Statement of points on which appellant, The Ohio Ferro-Alloys Corporation, intends to rely on appeal.

17. Any and all stipulations which may be hereafter filed regarding (a) the record on appeal or (b) the incorporation of exhibits in the transcript of the record or the transmission of original exhibits to the Circuit Court of Appeals for the Ninth Circuit; and any order or orders which may entered upon such stipulations or any of them.

18. Designation of contents of record on appeal.

Dated this 8th day of August, 1947.

F. D. METZGER,

R. M. RYBOLT,

Attorneys for Appellant.

DAY, COPE, KETTERER,

RALEY & WRIGHT.

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

The undersigned, attorneys for defendant City of Tacoma, hereby acknowledge receipt of copy of the foregoing Designation of Contents of Record on Appeal and of the Statement of Points on which the Appellant intends to Rely, being Item 16 of said Designation.

Dated this 8th day of August, 1947.

/s/ CLARENCE M. BOYLE,

/s/ J. DEAN BARLINE,

Attorneys for Defendant,  
City of Tacoma.

[Endorsed]: Filed Aug. 8, 1947.

---

[Title of District Court and Cause.]

### STIPULATION FOR TRANSMISSION OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between the Ohio Ferro-Alloys Corporation, plaintiff herein, and the City of Tacoma, defendant, by and through their respective undersigned attorneys, that all of the original exhibits which were offered and received in evidence, consisting of Plaintiff's Exhibits 1 to 16, inclusive, and Defendant's Exhibits A-1 to A-4, inclusive, being twenty exhibits in all, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that an order to that effect may be entered by the above-entitled Court upon the presentation and filing of

this stipulation and without other notice, and that none of said exhibits, nor any copies or reproductions thereof need be attached to or incorporated in either the appellant's condensed statement of the testimony or the reporter's transcript of the testimony.

Dated this 28th day of August, 1947.

/s/ R. M. RYBOLT,  
/s/ F. D. METZGER,  
METZGER, BLAIR, GARDNER  
& BOLDT,  
Attorneys for Plaintiff.

/s/ CLARENCE M. BOYLE,  
Corporation Counsel,  
Attorney for Defendant.

[Endorsed]: Filed Aug. 28, 1947.

---

[Title of District Court and Cause.]

### ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

Pursuant to the written stipulation of the parties on file herein,

It Is Ordered that the originals of all exhibits offered and received in evidence, to-wit: Plaintiff's Exhibits 1 to 16, inclusive, and Defendant's Exhibits A-1 to A-4, inclusive, shall be forwarded by the Clerk of this Court to the Clerk of the United



States Circuit Court of Appeals for the Ninth Circuit with the transcript of record on appeal.

Dated this 28th day of August, 1947.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ F. D. METZGER.

[Endorsed]: Filed Aug. 28, 1947.

---

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 93, inclusive, together with the original Reporter's Transcript of the Proceedings, and Plaintiff's original exhibits, numbered 1 to 16, inclusive, and Defendant's original exhibits, numbered A-1 to A-4, inclusive, comprise a full, true and correct record of so much of the papers, record and proceedings in Cause No. 914, The Ohio Ferro-Alloys Corporation, a corporation, Plaintiff, vs. City of Tacoma, a municipal corporation, Defendant, as required by Plaintiff's Designation of the Contents of the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Record on Appeal from the Judgment of

the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit the original Reporter's Transcript of Proceedings and the original exhibits above referred to.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Record on Appeal, to-wit:

Appeal fee .....	\$ 5.00
Clerk's fee for preparation of certified record .....	14.80
	<hr/>
	\$19.80

and that said amount has been paid in full to me by the Appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of this Court in the City of Tacoma, in the Western District of Washington, this 3rd day of September, 1947.

[Seal]

MILLARD P. THOMAS,  
Clerk.

By /s/ E. E. REDMAYNE,  
Deputy.

In the District Court of the United States  
Western District of Washington, Southern  
Division

No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

## TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 24th day of April, 1947, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the Plaintiff appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the Defendant, City of Tacoma, appearing by Howard Carothers, then Corporation Counsel, and Clarence M. Boyle, then Assistant Corporation Counsel, now Corporation Counsel.

Whereupon the following proceedings were had and done, to-wit:

The Court: Docket 914, The Ohio-Ferro-Alloys Corporation versus City of Tacoma, are the parties ready for trial?

Mr. Metzger: The plaintiff is ready, your Honor.

Mr. Boyle: The defendant is ready.

The Court: I have read, gentlemen, this pre-trial order submitted as a result of pre-trial conferences, and I find it to be in order and have accordingly signed it, and it will be filed, and the case will be tried upon the issues as there made. However, I think I shall request a statement from counsel representing the parties, because it might help to clarify this matter in the mind of the Court.

The issues, apparently from this pre-trial order, are not complicated issues. The facts, perhaps, in determining what they are might be somewhat difficult. If I understand the issues as presented by the pre-trial order, they are first as to whether there has been an overpayment by the plaintiff under what is designated as business compulsion by reason of a difference in the interpretation of the obligations growing out of this contract; and second, a declaratory judgment is sought as to what the rights of the respective parties would be in the future. Am I correct in that? [1\*]

Mr. Metzger: That is correct, your Honor.

The Court: Now, if you care to, Mr. Metzger, I'll hear from you, or——

Mr. Metzger: If your Honor please, before I make this statement, may I take the liberty of presenting to the Court, Mr. R. M. Rybolt, of Canton, Ohio, an Ohio lawyer who is of counsel for the Company at their home office, for the

plaintiff. I do not know that he will take any active part in the trial, but if he desires to, I ask for him the courtesy of being permitted to address the Court.

The Court: Your request will be granted, and the Minutes may show that he is recognized as a member of this Bar, for the purpose of this case.

Mr. Rybolt: Thank you, your Honor.

Mr. Metzger: Your Honor please, I believe the simplest way of making a statement of the issues and what the plaintiff expects to prove, is to treat this matter chronologically.

In the early spring of 1941, after negotiations, commencing in December, a contract was entered into, which is attached to the Complaint as Exhibit A, and is admitted with a slight correction, which is agreed to between the parties here. That contract provided for the furnishing of electrical energy by the City in two [2] different blocks; the first block, 6500 kilowatts, the furnishing of that was to go over a ten-year period. It was a firm contract, the City would furnish, the Company would take, as soon as the plant of the plaintiff had been constructed and was ready for operation. The plant was put in operation, the date is immaterial, but quite soon after, the contract was signed, a matter of a very few months.

Now, to insure and guarantee to the City, that The Ohio Ferro-Alloys Company would not be a "war baby" and come here for the war only and go away, the contract required—provided for an escrow fund.



The Court: The contract, however, was entered into prior to the declaration of war?

Mr. Metzger: Yes.

The Court: But while the defense program was under way.

Mr. Metzger: Yes. And that escrow fund relates only to what we call the first block of power, 6,500 kilowatts. In that first block of power, there is no controversy here concerning it: I mention it only in passing, so the Court will understand the situation. The escrow fund has been established, and I think was completely established, giving the City some ninety thousand or one hundred thousand dollars as security, [3] before the events which give rise to the controversy here, occurred.

Now this contract, in addition to providing for this first block of power, provided that any time upon request of the Corporation the City would furnish an additional block of power to operate a second furnace. That block of power was to be 6,000 kilowatts. And then it provided that that second block of power might be dropped or suspended, and might again be resumed, the taking of it, and the furnishing of it might again be resumed under certain conditions. I will have to go into those conditions more at length as we go along.

Well, in accordance with the contract, the second block of power was requested almost immediately after the contract was entered into; and the City commenced to furnish it, the plaintiff commenced to take it in November of 1941, and they continued

to take it without interruption for a matter of some twenty-seven months, or until April of 1944.

The Ohio Ferro-Alloys, in their operations here, manufacture ferro chrome, which is used in the production of steel, and was subject in the sale or marketing of their products—was subject to allocation by the War Production Board, and was subject otherwise—being an essential war product used in the furtherance [4] of the war program—was subject to other orders of the War Production Board. In the latter part of 1943 and January, I think, of 1944, the War Production Board issued orders relating to, or the allocation of this product; and the January order required the steel companies to use, not to use, I should say, scrap steel containing alloys, note that down, rather than buy new, freshly-produced alloys, that caused a complete interruption almost, of the business of The Ohio Ferro-Alloys. And so early in March—not early in March—but in March of 1944, the plaintiff requested the City—informed the City that their operations had been interrupted or interfered with by these orders of the War Production Board; and as a consequence they would be required to suspend operations, and that they were claiming the benefit of Article XIX of the contract, which is a clause permitting suspension for causes beyond control. It's a very broad article. It covers—it's a much broader provision than is commonly found in these clauses—"beyond control" clauses. Your Honor says he has read it—

The Court: Yes.

Mr. Metzger: —and I won't read it at length. It operates—is a mutual clause, the City has the benefit on the one side, and the plaintiff on the other; and it says: "If the operation of the Corporation's work is [5] suspended, interrupted, or interfered with, for any cause reasonably beyond its control," including, but not by way of limitation, not only breakdown of equipment, strikes, and acts of God, war in the United States, but then it says, "Governmental orders—Governmental regulations, orders or proclamations, priorities, or other causes beyond the control of the parties, the City need not deliver power hereunder, and the Corporation need not accept or pay for such power for such period of time and to the extent that such suspension, interruption, or interference makes it reasonably impractical to use such power, and monthly bills for any period, including any such suspension, interruption, or interference shall be prorated." As I say, the Company in the latter part of March, 1944, sought the benefit of this clause to suspend operation of the second furnace. The City took the position that Article XIX was not applicable, but said the City's situation with regard to its supply of power is such that we will consent and agree that you may suspend the taking of power for the second furnace, subject to renewing the taking of that power on thirty days' notice by either party. The City deemed it to their advantage as well as to the Corporation's advantage to permit the suspension of power at that time without—outside the contract, as a special arrange-

ment; and following that arrangement, [6] or proposal, or offer by the City, the Corporation, the plaintiff, did suspend the taking of power for the second furnace. The suspension was made on the 26th of April, 1944, and it was again resumed in September, 1944. Maybe I've got the years wrong, but I think that's correct. It was resumed in February—I am corrected—it was resumed nearly a year later, in February of 1945, and the taking continued thereafter.

In August of 1945, the Corporation gave notice, pursuant to Article X of the contract, that it intended to suspend operation of the second furnace; and then, a controversy arose as to the liability under the contract of the Plaintiff, if it did so suspend. This controversy was carried on by correspondence for some little period. It was initiated through oral conversations, in which the City's representatives stated that they did not know and the contract meant, or how it should be applied, in that particular instance, and that they would have to take advice from the Corporation Counsel. It culminated in the letter, I think, of October 13, 1945, in which the City advised the Corporation that they would stand on their position regarding the Corporation's liabilities.

Now, the facts will show—the evidence will show that following the giving of this notice of intent to suspend, the operation of the second furnace was [7] suspended, I think about September 4th. In other words, about two weeks after that notice was given. Then when this controversy, as to the



interpretation of the contract arose, and while it was pending and prior to the City's final announcement of its position, the operation of the second furnace was resumed for two weeks. It was closed down finally on the 8th of October, which was before the City's final announcement—or position had been announced; and it was not thereafter resumed for productive purposes. By some mischance or error, the evidence will probably show what, I don't know that there is any full explanation of it, there was one day in November—I think the 24th day of November, when the second furnace was not put into production or operation, but it was warmed up, while the other furnace was in operation. Well, after the 24th day of November, 1945, and since that time until today, only one furnace has operated.

Now, the City, in accordance with its decision announced in this letter of October 13, 1945, has taken the position that when Ohio Ferro-Alloys resumed the operation of the second furnace in February of 1945, they were obligated to pay for a full year, whether they took it or not. The Corporation believes, under a proper interpretation of the contract, that having taken the [8] second block of power for more than one year continuously when it was first put on, that when it put on—the furnace—it was permitted to put the furnace on the second time, it was obligated only to pay for the time it was in operation, or—I don't mean that exactly, I mean only for the period that it—until the suspension of it become effective, be-



cause there might be many days, or even periods, or weeks in that interval when it actually would not be in operation, but as long as they had the right to take, and hadn't surrendered the right to take, they had to pay, until the surrendered that right to take, and ceased to take it.

Now, if your Honor, please, the Ohio's position is this: In the first place, this first suspension is either under and excused by, Article XIX, because it was caused by the interference of the orders and regulations of a government agency, to-wit: the War Production Board; and if so, that suspension is eliminated so that for the purposes of the application of the other clauses of the contract, the taking of this second block was continuous from November 1941, until November 1945. Or, if it was not excused by reason of Article XIX on the action of the War Production Board, then it was excused by the special arrangement made with the City, where the City consented to the suspension because it was mutually [9] advantageous to both parties to suspend. And in either event, for the purposes of the application of the contract for the determination of the rates payable for the taking by Ohio, as I have said, been continuous from November 1941, until November 1945.

And then we came to the third question, which is the question on which we ask a declaratory judgment, which was involved in the other question or refund as well. The Ohio contends that under the true interpretation of this contract, any second taking of power for the second block—the 6,000

block, or load of power; that under the contract if they had once paid for a full year for that load, they take it again, they only have to pay for the time of the taking.

Your Honor will notice in this contract that it is a peculiar contract, as electrical contracts go. There is no rate or charge, generally speaking, for energy consumed. It's what's known, as a "demand contract." The first block of power is a demand of 6,500 kilowatts, and under that the Corporation pays each month 1/12th of \$17.50 times 6,500, irrespective of whether their furnace is in operation, or how many days or hours it's in operation, or how many kilowatts of power they use, they pay that based on that demand. Under the second block, as provided in the contract, [10] that, as Ohio interprets it, that when they first took on—on were permitted—when they first take on the second block of power, they pay for it for a full year at \$17.50 per kilowatt monthly, or a total of \$105,000.00, whether they use the power, or to what extent they use it during that period.

Then, if they suspend, under the contract, and not under their right under the contract, and not because of governmental interference, or not because of the special arrangement with the City, then they can only come back on and take that power if the City, in effect, in its judgment, absolute control judgment, elects to permit them to come back on the power, on—and their election—and the only thing concerning their election is the judgment of the City whether the City at that time

has surplus power; that is to say, power which the City's facilities are capable of generating, or are generating, for which the City has no sale for at the time. If the City determines that, then when the second block of power comes on, it is the Ohio's contention that under the terms of the contract properly construed, they pay for that power only so long as they take it; that is to say, at per month 1/12th of \$17.50 times 6,000 kilowatts—times 6,000.

Now, our contention—when this case was [11] first instituted, and a Complaint was drawn and filed, it was assumed by me, perhaps erroneously, perhaps I should have known better, but I assumed that the suspension of taking of the second furnace had occurred thirty days after the notice of intention to suspend; and the amount of refund that was claimed in the Complaint was based on an assumption that the suspension occurred on or about September 21st. During the course of preparation for trial, and during these pre-trial conferences, the Ohio has—the situation has developed which I have stated, and Ohio has waived any claim for refund except after November 24th, and that reduces the claim for refund from the \$44,000.00 set forth in the Complaint, to the \$27,041.00 and some cents, set forth in the pre-trial order.

Now the matter of business compulsion, if your Honor, please, it's admitted that all payments for which in part refund is sought, were made under protest—written protest. The business compulsion angle is that Ohio has this escrow fund of some nearly \$100,000.00, the amount is not material, per-

haps but a substantial amount; that under the terms of the contract if Ohio defaulted in payment of any bill as rendered, the City might declare a default under the contract and forfeit the escrow fund, in addition to the fact that they might [12] suspend delivery of power, and shut down Ohio's operations, which—as I have said, and one furnace has been continuous since the plant was completed early in 1941.

Now, we expect under those facts, and they will be developed, to show that we are entitled to this refund, and that we are entitled to a declaratory judgment from this Court, to the effect that on any—that on the resumption of power, taking of the second block which has already occurred, that on any future resumption which the City in its discretion may permit, in its judgment, because it has surplus power, may permit, the Ohio is obligated to pay, as the contract says, only pay for the energy used. Well, that's a little bit of a misnomer, because as I have already said to your Honor, there is no provision in this contract anywhere establishing what is known as an "energy rate," but to pay for energy used, as the contract expressly says, must be to pay for the time that the energy for the second block is being taken, or by months, or otherwise.

If I haven't made a clear statement, and if there are any questions, I would be——

The Court: Is there any dispute at all concerning the 6,500 kws.?

Mr. Metzger: There is no dispute about that at all. [13]

The Court: Neither on the matter of payment, nor on the matter of—

Mr. Metzger: I think that's entirely correct. As far as—for the first block, 6,500 kilowatts of power, there is no dispute between us.

Mr. Boyle: I think not.

Mr. Carothers: Except as to the amount you actually demanded during that period on your one furnace. There is a dispute over the demand.

Mr. Metzger: Well, the City's position there, your Honor, they should state it themselves, rather than for me to state it, I think.

The Court: Well, I want to see how closely you are in accord, and what we can eliminate.

Mr. Metzger: The—the—

The Court: From your statement I take it that the first unit of 6,500 kw's, was a demand obligation.

Mr. Metzger: Yes, they're both demand obligations.

The Court: And even if at any time during—involved herein, you use less than 6,500, you still have the liability to pay for the 6,500.

Mr. Metzger: That's right. As far as the [14] 6,500 is concerned, your Honor, please, where that one furnace is concerned, I think there is no dispute at all. The question arises here: The City, I will state it now—the City contends that when we gave a notice on August 21, 1945, that we intended to suspend the operation of the second furnace, that that required us to suspend at the expiration of



thirty days from that date. The notice didn't say when we would suspend. The contract merely says that we must give at least thirty days' notice; we might give sixty days' notice; we might give a hundred days' notice. The notice didn't say what date we would actually suspend. As I have said to you, the suspension did occur, the second furnace was taken out of production, and off the line, around about the 4th of September. Then the controversy arose as to the obligations, of Ohio to pay, and the second furnace was put back on the line for two weeks. Following October 13th, it was completely suspended and hasn't been resumed.

Now, the City says because after thirty days from our notice, the second furnace was in operation, they say one of two things, as a result: Either that our notice of suspension became wholly abortive, and for the purposes of the contract, we are still taking the second block of power; or that if under our notice we did suspend on September 21st, that they have a clause [15] in the contract which is called a "ratchet clause," it's found under the paragraph of the contract dealing with billing demand; and they say that under that clause, if we only had one furnace on, we had to pay for the highest actual demand recorded, even though the second furnace wasn't there, and that a demand was recorded of not 12,500 kilowatts, but of 11,988 kilowatts.

The Court: And is it admitted that that 11,988 kilowatts was energy consumed by one furnace alone?

Mr. Metzger: No, oh, no. No, that demand we will show, originated and was incurred during this period of two weeks when, as I have said, in the last week in September and the first week in October, when the two furnaces were in operation and before, as we contend, the suspension of taking of the second block became operative.

Mr. Boyle: May it please the Court, I think the counsel has fairly well covered the issues; and just on one or two matters, I wish to make our position a little more clear. This contract first, according to our contention, is a contract for power on an annual rate on a firm power basis. The provisions of the contract, taken as a whole, provide, as to the 6,500 block of power, the initial block, that payment shall be made upon the basis of \$17.50 per kilowatt, whether the power [16] is used or not.

The Court: That's a kilowatt year, I presume?

Mr. Boyle: Yes. The contract further provides that the payments shall be made on a basis of the actual demand used in any period during the year, if it is in excess of the contract demand, or 6,500. On the second furnace, according to our contentions, the same prevails, with the exception that there is a provision in the contract that on discontinuance of the second furnace, following one year's consecutive operation thereof immediately preceding the discontinuance, then the charge for that furnace shall be prorated up to the time of discontinuance; and that the annual feature as to the additional load, is destroyed in case of the discontinuance.

That brings us down to the City's position on the

question of the notice given. As counsel has stated, notice was given to the City on the 21st of August, or by letter on that date, that there would be a discontinuance under Section, or Article X, of the contract.

Counsel has stated in Court, although the pleadings show the discontinuance on the 20th of September, he now states that the discontinuance actually occurred on September 4th; and that two or three weeks [17] later, service was resumed. Now, it's our position that if there was a discontinuance on September 4th, then—and service resumed, you have a destruction of the year's continuity, and even under that contention, the plaintiff was required to pay the contract rate for the full 12,500 load. If there was not a discontinuance at that time, or the events following, the correspondence between the parties will show that there was a waiver of the right of discontinuance. It's a waiver of this notice, if you please; so that, under that theory, no proper notice has been given of any discontinuance of the 6,000 block. If——

The Court: Let me ask you this question in reference to your pretrial stipulation. It appears that in October, November, and December of '45, the power actually consumed, I take it this demand—this language, demand power for those months was actually consumption power?

Mr. Boyle: No, your Honor, I don't believe that is correct. The consumption of the power, the amount consumed, has no bearing on the demand. Those figures show that during those three months,

that the highest actual demand at one time reached the figures that are set forth there.

The Court: For the operation of a single [18] furnace?

Mr. Boyle: That's the question. If the notice suspended the second furnace, then it's our position that, under the terms of the contract, they will be required, and are required, to pay for a period of eleven months under the initial block of power, a bill based on the highest demand that occurred during that eleven-month period. So that if—to illustrate it—if we take and arrive at the demand of 11,988 for—I believe that is the month of October—and their position is correct, our going under the contract for the single furnace would be based not on 6,000 demand, but on a demand of 11,988. Now, have I made myself clear?

The Court: Not entirely. Now, the first unit of this plant was assumed to require a maximum of 6,500 kilowatts.

Mr. Boyle: That's right.

The Court: And whether that was used or not, it was to be paid for on that basis; and the City was required to stand ready to serve to that extent.

Mr. Boyle: That's correct.

The Court: And throughout the time involved here, the payments were made on a basis of 6,500 kilowatts, on this first unit.

Mr. Boyle: I think that's correct with this [19] addition, that if at any time prior to the second furnace going on they exceeded the 6,500 demand—let us illustrate by saying their demand, actual de-



mand was 7,000—we were not required to stand ready to furnish an excess, but they were billed on that 7,000 for a full period of a year from the date of the—that the demand increased, so that the contract provisions, the firm power agreement, was on 6,500, but their bills were rendered not on the consumption of energy, but upon the highest demand that they took for a thirty-minute period during the terms of the contract, and that billing would be continuous for an eleven-month's period thereafter, so that if——

The Court: That is whatever their peak-load happened to be in excess of 6,500, that they thereafter became obligated to pay throughout the period of the year of whatever the peak-load was.

Mr. Boyle: That's correct. So that we contend here that even though the Court should find that proper notice was given, and there was in fact a suspension, that the billing, the amount of refund would be based upon the difference between 12,500 kilowatts, which we billed under our contention, and the highest demand that occurred during that eleven-month period, which I think will probably be shown as 11,988.

The Court: And now does the contract specifically [20] cover this provision that you——

Mr. Boyle: Yes, I think it does, I think counsel would probably admit that.

Mr. Metzger: I'll admit there is a ratchet clause in the contract, yes, your Honor, that's there. I do not admit and I want an opportunity to present to



the Court an objection to certain statements counsel has made as being not properly before—that position or assertion that he is now making is not within the issues of the pleadings as made. In other words, if your Honor please, counsel has stated here now for the first time that Ohio waived its notice of intended suspension of given or dated August 21, 1945. There is no plea to that effect, and the waiver, I think, has to be set forth and specifically pleaded.

The Court: The Court is not going to try this case on grounds that are technical at all, particularly when an interpretation of the contract is sought, and declaratory judgment is sought. If there's surprise, I would rather continue the case, and give you an opportunity to meet it——

Mr. Metzger: Well, we have all our witnesses here.

The Court: But the purpose of a pretrial conference and the pretrial order, is to eliminate those [21] very things and the pretrial order can frequently be more comprehensive than the pleadings are.

Mr. Metzger: That is true, but it is not embodied—and this is the first time I have heard anything about any waiver.

The Court: Except, Mr. Metzger, the amount of power consumed during November, October, November and December, and that's what led the Court to make the inquiry it did.

Mr. Metzger: If the pretrial order does state then we have no—if that is the fact, that the demands registered, the maximum thirty-minute de-

mands registered in those months, according to the City's contention, were so and so, we admit that the demands were in October as stated. We don't admit any demands—maximum demands, in excess of 6,500 after November.

The Court: Well, apparently from this pretrial order, it is admitted there is no contention that there was—that there was a consumption, I mean, rather than a demand—after November or December.

Mr. Metzger: Well, none of us are talking about consumption. We're all talking about demand. The whole contract deals with demand.

Mr. Boyle: Yes, I think that's true.

The Court: Well, it involves the other [22] element though, of what your maximum load was at some one time, and thus the demand grows out of the maximum load.

Mr. Metzger: Well, that's demand, your Honor. It's demand, that doesn't—I mean, for example, your Honor, please, to make it very simple, in your home, if you had a demand meter which no citizen—no residence does, but if you had your electric stove, and you had all your lights on, and you had the vacuum cleaner going, and every electrical appliance in the house all going at one time, that would draw so many kilowatts of power, and that would be the maximum demand, but you might only have those on, all simultaneously, for one minute only. Now, you wouldn't take kilowatt hours, because at that time you only had all these things on for a very few minutes, or seconds, even, altogether, but that would register a maximum demand.

The Court: I understand that, I think, Mr. Metzger.

Mr. Boyle: The Court asked for a reference to the—any place in the contract which supported the billing upon the highest actual demand during the period. The Article VII of the contract reads as follows: “The Billing Demand,” that’s the demand which we bill, “shall be the contract demand, or the actual thirty-minute [23] integrated demand, as determined in the following paragraph, whichever is higher, provided, however, that the billing demand for any month shall not be less than the highest actual demand, which occurred during the immediately preceding eleven months, except if specified to the contrary under Alteration or Cancellation of contract demand, and that is the feature that governs. Just one more matter with reference to the shut-down which occurred in, I believe it was April of 1944. Is that correct, Mr. Metzger?

The Reporter: That’s correct.

Mr. Boyle: That is the shut-down, which the City contends was agreed to by both parties, and a special arrangement made only to the extent that the plaintiff in this case would have the right to come back and resume its load upon the giving of 15 or 30 days’ notice. It is our contention that that arrangement in no way affected any other provision of the contract, but simply gave to the plaintiff assurance that the plaintiff would be able to pick up this load, at a time that either the City, or the plaintiff, desired.

The Court: Well, I am still a little confused as to how this shut-down by reason of War Production Board orders, becomes material here.

Mr. Metzger: Your Honor, please—— [24]

The Court: ——particularly in reference to whether—there is no refund sought for that period.

Mr. Metzger: No, your Honor, no. The Ohio—it has been said sort of in the vernacular—has three strings to its bow. If your Honor holds with us, that the proper interpretation of this contract is that on resumption of taking of the second load,—second block of power, which as I have said is solely in the City's discretion whether do it or not, if they have—if it deems it has surplus power, that then we only pay the demand charge for the number of months that we continue to use it. If your Honor eventually so holds, then frankly, the question of the previous suspension, whether it was for a cause beyond control, or whether it was under a special arrangement with the City, becomes wholly immaterial, because that ruling interpretation of the contract will cover the point.

Now, on the other hand, if by chance, or in your Honor's judgment, our interpretation should be incorrect, then the matter of either the suspension for a cause beyond control, or a suspension outside of the contract, by a special arrangement with the City, becomes—one or the other of them becomes material, for in either of those events, for the purposes of the contract, that period of suspension is excluded from consideration, [25] and the taking of the second block has been, for the pur-

poses of the contract, continuous from November, 1941, until whatever date the suspension occurred. And in that event, the clause of the contract is specific, that if we once start up the second furnace and we take it continuously for more than a year, the excess fractional part of a year over one year is to be paid for prorated, that is, to be paid for on a monthly basis; and that contention—that construction, will again sustain Ohio's claim for refund.

The Court: It's time now—do you have anything further that you want to say, Mr. Boyle?

Mr. Boyle: Unless I clear up further the matter that the Court asked about. I don't know whether I could be of assistance to the Court on that.

The Court: Is the City making a contention that the War Production Board orders were not effective insofar as this contract is involved?

Mr. Boyle: Yes, your Honor, we contend they did not affect the contract and they did not give cause to the right of the company to suspend under Article XIX. Under Article XIX there is no question but that the—if the cause was applicable that they could suspend, and the bills then would be prorated during the time of suspension, so that it does become important [26] to determine whether or not this was a cause mentioned in XIX.

The Court: Well, of course, I would have to be advised more fully as to what those orders were; generally speaking, I would be inclined to hold that the orders would be effective orders, they were emergency measures and war orders, and——



Mr. Boyle: I might clear up our position on that a little——

The Court: ——and they were beyond the control of anyone—any private corporation, or any municipal corporation, if they directly involved this situation.

Mr. Boyle: It's our position, your Honor, that the first orders of which counsel has spoken, do not limit the company in the production of this product; perhaps, limit it in the sale of the product; and the final order, upon which they are relying, is an order which simply provides that manufacturers of steel, not manufacturers of ferro chrome, which this company was manufacturing, should use a certain amount of scrap content in that manufacture. Now, it is our position that that did not interfere with their production, their product at all, it might have lessened their market for their product, but it interfered not at all with the production. [27]

The Court: I think we will suspend this case for the time being—I'm going to take the morning intermission shortly, but I have some ex parte matters involving the Lands Provision that I shall take up now, and then will call a recess.

Mr. Metzger: Well, we are excused now until Court reconvenes after recess?

The Court: Yes, at least twenty minutes.

(Recess.)

The Court: Now you may proceed, Mr. Metzger.

R. L. CUNNINGHAM

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name?

A. R. L. Cunningham.

Q. And where do you live, Mr. Cunningham?

A. Hartville, Ohio.

Q. Are you employed by—do you have a position with the Ohio Ferro-Alloys Company? [28]

A. Vice-president of the Ohio Ferro-Alloys Corporation.

Q. How long have you been with that company?

A. Since 1939.

Q. Since 1939. And how long have you been Vice-president? A. Since May, 1946.

Q. Prior to that time?

A. I was assistant to the vice-president from January 1, 1944, to the time of May, 1946.

Q. What's the nature of your duties during the period from '41 on, in a general way?

A. An executive, an official of the corporation.

Q. Do you have anything to do with the plant, or Tacoma operations?

A. I have been in charge of production since January, 1944, in complete charge of production.

Q. In complete charge of production?

A. And sales.

(Testimony of R. L. Cunningham.)

Q. And that includes the Tacoma plant?

A. It includes all points.

Q. All points. I take it then that you are familiar with the contract with the City of Tacoma, and the Ohio Ferro-Alloys Corporation, dated March 21, 1941?

A. Yes, I am.

Q. Did you have anything to do with giving the notice to the City, of suspension, or intended suspension of [29] operation with the second furnace, in 1945?

A. Yes, on August 21, 1945, I wrote a letter to the City advising them that we wished to suspend the taking of the second block of power, 6,000 kws. and——

Q. I am handing you a photostatic copy of a letter marked for identification, Plaintiff's Exhibit 1, and ask you if that is a copy of the letter that you referred to.

A. That is a copy of the letter referred to.

Mr. Metzger: We offer the same in evidence, if your Honor please, and counsel—we have an agreement between counsel that copies may be used in lieu of originals.

The Court: Very well, it will be admitted in evidence.

(Whereupon photostatic copy of letter referred to was received in evidence and marked Plaintiff's Exhibit #1.)

(Testimony of R. L. Cunningham.)

PLAINTIFF'S EXHIBIT No. 1

Copy

August 21, 1945.

Air Mail

City of Tacoma,  
Department of Public Utilities,  
Light Division  
Tacoma, Washington.

Attention: Mr. Verne Kent,  
Superintendent of Light Division

Gentlemen:

We wish to give the required 30 day notice that we wish to discontinue the use of the 6,000 kw. block of power for our #2 Furnace and that billing for power be reduced to cover the initial block of 6,500 Kilowatts.

We have some extensive repair work to be done on these furnaces and wish to take advantage of the present lull in business to accomplish that end. We still hope to operate two furnaces at Tacoma and will endeavor to give early notice for return of this second furnace power.

Yours very truly,

OHIO FERRO-ALLOYS  
CORPORATION.

R. L. CUNNINGHAM,  
Asst. to the President.

RLC:cm

jlm 12/4/45 3 copies

(Testimony of R. L. Cunningham.)

Q. Mr. Cunningham, this letter says, "we wish to give the required thirty-day notice that we wish to discontinue the use of the 6,000 kw. block of power for our second furnace." Had you at that time determined on any specific date for the shut-down? A. No, we had not.

Q. Of that second furnace? And the letter did not specify? [30]

A. The letter did not specify the suspension date.

Q. The suspension date. Now following that letter, did you have any oral communication with any City official?

A. Yes, on August 24, 1945, I called Mr. Darland, who was then City Light Superintendent by long-distance telephone, from Canton, to his office here in Tacoma, in reference to the arrangements of the suspension; and while talking to him, he made the statement that the City was not clear as to whether the twelve consecutive months mentioned in the contract, referred to the original or initial twelve consecutive months, or whether they were to be applied against this second taking of power starting February 26, 1945.

Q. Well, now, just a minute right there, Mr. Cunningham. Do you have a copy of the contract of March 21, 1941, with you?

A. I don't have it in my pocket.

Q. Just for the convenience or enlightenment of the Court, you say that Mr. Darland told you that the City wasn't sure whether the 12-months' period



(Testimony of R. L. Cunningham.)

applied only to the initial taking, or to a second taking of the second block of power, is that right?

A. That's right.

Q. Will you just point out to the Court what paragraphs of the contract refer to this 12-months' taking? [31]

A. Section 10-A, Paragraph starting—the last paragraph in 10-A: "If and when the Corporation should drop its additional 6,000 kilowatt requirements, either temporarily or permanently, and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load, the 'ratchet' clause specified under 'Billing Demand' will be dropped proportionately."

Q. All right. Well, now, Mr. Cunningham, at that time had the Ohio Ferro-Alloys made at least twelve consecutive monthly payments for the 6,000 kw. load?

A. Yes, they had made approximately 27 months' payments. Continuous——

Q. For the period from what?

A. From November '41 until April '44.

Q. April '44. And you say Mr. Darland told you the City was uncertain whether that twelve-months' clause applied to—had been satisfied, in other words, or whether it had not, is that right?

A. That's true. He could not make any decision over the telephone. He said he would have to check with the City attorney to determine what their stand would be.

(Testimony of R. L. Cunningham.)

Q. All right. Following that, what happened with respect both to any further correspondence with the City, of communications from the City, in respect to the actual use or operation of the second furnace? [32]

A. Well, August 27th, I received a wire from Mr. Darland, stating that it was their contention that these twelve consecutive months mentioned in the contract would be applicable to the second taking, or to the effect that we would have to pay from February 1945, for twelve months, or ending February 1946; and that the billing—

Q. Without going too much into detail, into the contents of that letter, he and the City announced the position. Did you acquiesce in that position?

A. We did not. We countered that with a wire immediately stating that we did not concede to that interpretation, and we then, during the month of September and October, there was an exchange of correspondence between the City and ourselves, relating to each other, or we related to them our position, and they in turn theirs.

Q. All right. Well, what was the situation at that time with respect—this is now all following your letter, Plaintiff's Exhibit I, what was the situation with respect to the use or operation of the second furnace?

A. Well, we suspended the operation of the second furnace on September, the 4th, and—

Q. That was prior to your—that was within less than thirty days from the date of your letter?

(Testimony of R. L. Cunningham.)

A. That's right. And the furnace was still under suspension on September 21st. It was our thought that if the City [33] was to follow our interpretation of the contract, that their meter men would be at the plant on September 21; and we set the demand here back to one-furnace operation, which they had previously done on the first suspension—or the first drop in the power on April 26, '44. No meter man appeared, and nobody appeared the next day, so we used the second furnace for a period of two weeks, and on—I think that was October the 8th, it was then taken out of production, and that block was never used for production purposes since.

Q. At the time then that you took it out of production, this correspondence by letter and telegram to the City regarding the construction of the contract was still going on.

A. Was still going on. On October 15th, we finally received a letter stating—from Mr. Darland, to the effect that we need not write any further, that there was——

Q. Do you have that letter with you?

A. I do.

Q. Will you produce it, please?

Mr. Metzger: We offer that letter in evidence, as Plaintiff's Exhibit 2.

The Court: It will be admitted in evidence.

(Whereupon letter referred to was received in evidence and marked Plaintiff's Exhibit No. 2.) [34]

(Testimony of R. L. Cunningham.)

PLAINTIFF'S EXHIBIT No. 2

[Letterhead City of Tacoma]

October 13, 1945

Air Mail

Registered Return

Receipt Requested

Mr. R. L. Cunningham, Asst. to the President  
Ohio Ferro-Alloys Corporation  
Canton, Ohio

Dear Mr. Cunningham:

We acknowledge the receipt of your letter of September 25, 1945, regarding the interpretation of various sections of our power contract as affecting the requested reduction in load at your Tacoma plant.

In reply thereto, we reaffirm our previous position that the annual kilowatt year rate applies, unprorated, in this case, until the Corporation shall have paid at least twelve consecutive monthly payments based on a contract demand of 12,500 kilowatts effective February 26, 1945; this position being based upon the fact that Article 19 of the Contract was not applicable to the April 26, 1944 to February 26, 1945 shut-down of the second furnace. As stated in our former letter the position of each of the parties with respect to the applicability of Article 19 was expressly reserved. This understanding is supported by the correspondence,

(Testimony of R. L. Cunningham.)

and I have been informed, was agreed to by your Mr. R. C. Cole of the Tacoma plant who represented the Company in the negotiations at the time.

We feel that little more can be accomplished by a further exchange of correspondence other than to reiterate our previous position. However, if you desire to have your representatives confer with us, we will be glad to meet with them.

Very truly yours,

/s/ A. F. DARLAND,

Superintendent of  
Light Division.

AFD:jw

[Endorsed]: Filed Sept. 5, 1947.

---

Q. Mr. Cunningham, you say that following October 8th, the operation of the second furnace has been wholly suspended?      A. That's true.

Q. And continuously since that time?

A. That is true.

Q. Now, at any time after that date, was there current employed—electric current used simultaneously in both of your furnaces?

A. Yes. In November there was power used to warm up the one furnace and interchanging from one product to the other, and this power was not used for production purposes; it was used to warm up the furnace; and on November 24th, from that



(Testimony of R. L. Cunningham.)

date on, no energy has been used, based on our recording demand meters, and limiters, and other apparatus, in excess of the 6,500 kw's specified within the first block of power.

Q. Well, Mr. Cunningham, you just now mentioned something about your demand meters and demand limiters. What devices does the company have to show the quantity of power that is being taken? In other words, to regulate or indicate the demand imposed upon the City's facilities?

A. Well, we first have a Westinghouse recording demand meter, which has an ink hand that records the energy as used in a cycle each half hour. This meter then [35] records the high demand reached in each half hour, continuously, from the time it is put into operation. There was no such demand shown on our chart, in excess of the 6,500 kw's since November; besides that——

Q. Does that chart—does that chart run every day?

A. It runs continuously from the time it's installed until the plant shuts down.

Q. That meter was installed and in operation——

A. It was installed in——

Q. ——in September of 1945?

A. That is true.

Q. And prior thereto, I take it.

A. That's true.

Q. And it has been continuously in good operating condition, and in operation since that time?

A. That is true.

(Testimony of R. L. Cunningham.)

Q. Do you have, in the line of your duty, have you examined the charts made by that meter?

A. I have.

Q. And there has been no recorded demand in excess of 6,500 kw's since November 24th, 1945? Is that correct?

A. Absolutely.

Q. Now what other devices does your corporation have?

A. We have a demand limiter, a General Electric demand limiter, which is set to kick off the plant load, or the [36] furnace, when it reaches a setting which we have set for 6,384 kw's; in other words, when our peak load gets up to 6,384, or in excess of that, it kicks the furnace off and the power is dropped and remains off until the half hour in question is reached; and it resets and the furnace then can be put back on the line. That also has been in operation since the plant was built, and was in good working order during this disputed time.

Q. Now, with that demand limiter in operation and in good working order, and set at 6,384, would it be possible for Ohio Ferro-Alloys Corporation to impose a demand upon the City's electric facilities in excess of 6,500 kw's?

A. No, it would not. It would kick the power off before it reaches 6,500.

Q. Was that limiter in good working order during all of that period?

A. Yes, it was. I think it was inspected by the

(Testimony of R. L. Cunningham.)

General Electric Company just a few days prior to the end of the year, the end of 1945, and it was regularly inspected.

Q. I hand you what has been marked for identification Plaintiff's Exhibit 3, and ask you what that is?

A. Well, its a chart that has been used on our Westinghouse demand meter.

Q. That's a section of a — [37]

A. Section of a tape—

Q. —of a tape, on which that demand meter records the 30-minute demands imposed by your taking, is that correct? A. That is true.

Q. And, as you have said, that meter has made a chart like that, a permanent record, continuously since—prior to September 21, 1945?

A. That is true.

Q. Now, Mr. Cunningham, following September, 1945, and up to and including the month of February, 1946, how did the City bill the Ohio for energy?

A. The City billed on the basis of 12,500 kilowatt demand.

Q. That was—how did they make up that?

A. Well, it was the initial 6,500 kw. block plus the second additional block of 6,000, or a total of 12,500.

Q. Did you—what did you do about those bills?

A. We protested in writing the October bill through February 26th; and the reason we did that was because of our thought of the City claiming a

(Testimony of R. L. Cunningham.)

breach of contract that would affect the first block of power, and a forfeiting of our \$90,000.00 in escrow fund.

Q. The escrow fund was provided for in what article of the contract? Do you recall?

A. I don't recall.

Q. It's in the contract. [38]

A. It's in the contract.

Q. And at that time Ohio had paid into the City—did you say \$90,000.00?

A. Ninety some thousand dollars.

Mr. Metzger: Your Honor please, it is admitted and set forth as such in the pretrial order, and by the pleadings that these payments were made under protest.

Q. Now, Mr. Cunningham, if it hadn't been for this escrow fund and the danger of a possible attempt to forfeit that, would you or would you not have withheld payment of these bills?

A. Well, we would have withheld payment, because we were not using the power.

Q. I think, Mr. Cunningham, in connection with the bill of February—February 1945, in addition to your protest of the payment generally that the same as you had been protesting it before, you specifically protested, and in any event, that even under the City's construction of the demand, it should be reduced as of February 26th, did you not?

A. That was 1946.

Q. 1946.

(Testimony of R. L. Cunningham.)

A. Yes, we received a bill for the 12,500 kilowatt charge, for the month of February, 1946, in its entirety. I [39] wrote the City with reference to this, stating that under their contention, they should have only billed us until February 26th. They conceded in that, and gave us credit on the following bill, for the two days' overcharge.

Q. In other words, the City at that time, by its action, admitted that——

Mr. Boyle: Just a moment there—I object, as calling for a conclusion.

Mr. Metzger: All right. I withdraw that question.

Q. The City on your contention, dropped its billing to a contract demand of 6,500 kw. on and as of February 26th, 1946?

A. They conceded and dropped the billing to 6,500 on February 26th.

Mr. Metzger: Your Honor please, the City's demand for production or for admission of the genuineness of certain documents, contains this protest the witness has been testifying to. I do not have any copy of it. I would like to—except as it was furnished with their demand.

Q. Handing you now paper marked for identification Plaintiff's Exhibit 4, ask you if those two letters, one dated March 7th, from you to the City and one dated March 13th, I think, from the City to Ohio, are the letters you [40] referred to regarding this protest of the February bill and the City's reaction thereto.

A. They are.



(Testimony of R. L. Cunningham.)

Mr. Metzger: We offer the same in evidence.

Mr. Boyle: No objection.

The Court: It will be admitted.

(Whereupon document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. Mr. Cunningham, what is the amount that Ohio has overpaid for the period subsequent to your notice of intended suspension to and including the bill rendered for February, 1946?

A. You mean what date? Starting what date?

Q. Well, what is the amount for which the City—the Plaintiff, the Ohio Ferro-Alloys Corporation is claiming a refund?

A. We claimed a refund of \$44,000.00.

Q. Originally? A. Originally.

Q. Now what are you claiming?

A. We are claiming \$27,000.00, conceding the demands set in October and November were a very small part of the demand that we could have used—or the energy we could have used. We are assuming and paying for that, or [41] deducting from our original claim, some \$18,000.00.

Q. Mr. Cunningham, as a matter of fact, in November how long a period was there any energy being used for two furnaces simultaneously?

A. I think it was three days.

Q. In November?

A. November. Three days.

Q. Three days. A. Parts of three days.

(Testimony of R. L. Cunningham.)

Q. Parts of three days.

A. Parts of three days.

Q. And in October? A. Seven days.

Q. Seven days? A. Seven.

Q. And you were paying a bill under which you could have used both furnaces simultaneously for thirty-one—thirty or thirty-one days?

A. On the basis of energy used, we could have used better than four million kilowatts per month on a furnace; in this case, we used a couple of hundred thousand kilowatts, a very small portion.

Q. And you say you are claiming—your claim for refund was \$27,000.00. Actually it was set forth in the pretrial order as \$27,041.00 and a few cents?

A. That is true. [42]

Q. And ten cents, is that right?

A. That is true.

Mr. Metzger: That is all, cross examine.

### Cross Examination

By Mr. Carothers:

Q. You have never been in charge of the Tacoma Plant at any time, have you? A. Yes, I have.

Q. When—what period were you in charge?

A. In what way do you mean?

Q. Well, I mean here on the ground? Have you—

A. At various intervals, I have been in charge on the side.

Q. But you at all times had a local manager, is that true? A. That is true.

(Testimony of R. L. Cunningham.)

Q. And on frequent occasions you visited the Tacoma plant, is that right? A. That is true.

Q. So that when you stated a few minutes ago that these devices limit and measure the energy used were in good shape, you were just taking somebody else's word for it, is that it?

A. Well, I have observed them when I was here; I have observed the charts which they have recorded, and which [43] came into the Canton office monthly.

Q. But you have no knowledge yourself as to the condition of those devices?

A. I don't think anyone would, except an expert.

Q. You gave the City no notice—the fact that you closed down your furnace on the 4th of September, 1945——

A. I gave them no notice. I asked—I talked to Mr. Darland about a 15-day notice, and he immediately went into the question of whether the——

Q. Well, on August 21, 1945, you transmitted your notice that you were giving the required 30-day notice, is that right? A. That is correct.

Q. And twelve days later, you shut down before the thirty days could possibly come about, is that right?

A. That's true, we had the privilege.

Q. And so, you were shut down on the 24th—on the 22nd of September, at midnight.

A. The 21st, also.

(Testimony of R. L. Cunningham.)

Q. Yes. In your complaint you allege you shut down on the—at midnight on the 22nd of September.

A. Well, we were shut down prior to that, and afterwards.

Q. Well, now when did you—after the 22nd of September did you resume operation of the furnace? A. The 24th. [44]

Q. The 24th of September?

A. That is right.

Q. And you ran how many days?

A. Until the 7th of October.

Q. And you ran including—did you open on the 24th?

A. We started partial production on the 24th.

Q. So you had seven days in——

A. We did not have production, we warmed the furnace up for about five days.

Q. Seven days in September and seven more days in October, you operated.

A. We warmed the furnace up for the first time.

Q. Well——

A. We didn't have production.

Q. Then you shut down on the 7th.

A. That is true.

Q. Did you give the City any notice that you were shutting down on the 7th of October?

A. They already had notice that we were going to shut down on the 21st.

Q. Yes.

(Testimony of R. L. Cunningham.)

A. We had the furnace off on the—at the end of the thirty-day period——

Q. That's right.

A. ——we were still in litigation with the City on October, [45] the 7th yet, and as late as October 15th.

Q. You just answer my question. After September 22, 1945, you gave the City no notice whatever of your intention to resume operation of the second furnace, did you?

A. We gave the required 30-day notice.

Q. On August 21——

A. That's right

Q. Which means that you were shutting down on the 21st of September, is that right?

A. Not necessarily.

Q. Well you were down, were you not, on the 21st of September?

A. We were down on September, the 4th.

Q. And you stayed down until the 24th of September?      A. That is true.

Q. From that point on, you did not notify the City you were going to open up and operate, did you?      A. They never recognized——

Q. Now, just answer my question. Did you give any written notice?

A. No, we did not give any.

Q. Now, then in November you opened up and operated for three days, did you not?

A. We didn't operate——

Q. Well, you operated two furnaces at one time, you had the [46] power on for both of them,



(Testimony of R. L. Cunningham.)

and ran the demand up to some 10,000, did you not?

A. On the basis of warming up the furnace.

Q. Just answer my question—did you run the demand up to 10,000 or over?

A. We run——

Q. That means you were operating both furnaces at one time, whether you were producing or not, doesn't it?

A. The power was on the furnace.

Q. Okeh. Did you give the City any notice whatever for that?      A. No, we did not.

Q. Why not?

A. We are only claiming a refund from November 24th.

Q. Is that so, well, how do you happen to—Who is Mr. Pritz, president of your Company?

A. Which Mr. Pritz are you talking about?

Q. L. G. Pritz?      A. L. G. Pritz.

Q. Yes.

A. He is president of the company.

Q. How do you explain the fact that on November 6, 1945, Mr. Pritz, as President of your Company, in remitting—in making remittance for the energy consumed in October, made the first protest that you were only operating one furnace and that you should only pay on the one furnace? [47] In other words, when you remitted the \$18,247.26, you did so under protest when they were covering the October bill. How do you explain it?

A. Well, I think it's self-explanatory. It states that we are paying under protest.

(Testimony of R. L. Cunningham.)

Q. Well, if you operated your furnace—those furnaces in October—what is the basis for making that claim, in this November 7th letter?

A. I think I recited that before; it was based on the fact that we did not wish to have a chance of the contract being breached, and the forfeiting of the \$90,000.00 covering—called for in the contract.

Q. Handing you Defendant's Exhibit A-1, purporting to be a copy of the November 6, 1945, letter, that I have just referred to in my last question, do you recognize that?      A. I do.

Q. That is a copy of—

A. It appears to be.

The Court: You had better have it marked, or pass it to the Bailiff.

Q. Handing you Defendant's identification A-2, which purports to be a copy of a letter that Mr. Pritz, your president transmitted to the City of Tacoma, on December 7th, wherein remittances for November—the November bill was made and containing the same protest of payment as the [48] November letter did. Do you recognize that as a copy of the letter?      A. It appears to be.

Mr. Carothers: We offer it.

The Court: Any objection?

Mr. Metzger: No objection.

The Court: It may be admitted in evidence.

(Whereupon letter referred to was received in evidence and marked Defendant's Exhibit No. A-2.)

(Testimony of R. L. Cunningham.)

DEFENDANT'S EXHIBIT A-2

December 7, 1945

Airmail

City of Tacoma,  
Department of Public Utilities,  
Light Division,  
Tacoma, Washington.

Gentlemen:

You will please take notice that in payment to you this date of the sum of \$18,247.26, being the amount charged for electric current furnished during the month of November, 1945, against the undersigned The Ohio Ferro-Alloys Corporation, under a certain power contract between said Company and the City of Tacoma is not paid voluntarily.

From the information which we have it appears to us that the charge made against our Company is not in accordance with the terms of the contract, but inasmuch as the City declines to proceed with the furnishing of power under the contract unless our Company accepts the City's interpretation of the contract, we have no option but to make payment under protest and with the distinct avow that the whole amount is not due to the City.

Very truly yours,

THE OHIO-FERRO ALLOYS  
CORPORATION,

/s/ L. G. PRITZ,

LGP

President.

JLM

[Endorsed]: Filed Sept. 5, 1947.

(Testimony of R. L. Cunningham.)

The Court: It is now time for the noon intermission. I think we will suspend until 1:45 this afternoon.

(Recess.) [49]

The Court: You may proceed.

---

### R. L. CUNNINGHAM

resumed the stand for further examination, and testified as follows:

#### Cross Examination

By Mr. Carothers:

Q. Mr. Cunningham, on the 27th of August, 1945, which was six days after you had notified the City by letter of your intended shut-down, the City advised you by wire that—of our interpretation of the contract, which would be required to operate for a twelve months' period, that is as to second furnace, or you would pay for it whether you operated or not. Is that true, on the 27th?

A. Something to that effect.

Q. And on the 13th of—on September 14th, 1945, you were advised by letter to that same effect, were you?

A. Prior to that there were other wires involved.

Q. Yes. On September 14th, you were advised that the City adhered to its position taken in its August 27th letter.

(Testimony of R. L. Cunningham.)

Mr. Metzger: If your Honor please, if an issue is to be made of this, I'll object to it because the letter is the best evidence and should be offered.

Q. Did you receive a letter dated the 14th of September, 1945, from Mr. Darland? [50]

A. I can't enumerate the many letters. There were many letters and there were various statements we had in our file.

Q. Well, I believe you testified on direct examination that such a letter was received by you—did you not?

A. October 15th was the letter I mentioned. We received it October 15th. I think it was written on the 13th.

Q. And that October 15th letter was to the same effect, was it not?

Mr. Metzger: The letter speaks for itself.

A. The letter says, at the bottom of the letter "No further correspondence need be handled with the city, because they would not go along.

Q. Now, you say that the City—that you only paid the City \$27,000.00, is that correct?

A. We are claiming that refund.

Q. Yes, and for what period is that claim made?

A. November 24th to February 26th, '46.

Q. Well, did you notify the city on November 24th, 1945, that you were shutting down the second furnace?

A. We notified the City on August 21st.

Q. So on the 24th, without any notice, other



(Testimony of R. L. Cunningham.)

than the August 21 letter, you shut down? The 24th of November you shut down the second furnace.

A. It had already been shut down before that.

Q. Well but you operated three days. You had the furnace on for three days.

A. 36 hours, to be exact.

Q. Well didn't you testify——

A. Parts of three days I said.

Q. Well how did you expect the City to know that you should only pay from the 24th of November, in the absence of any notice from you, as to the date when you shut down?

A. The City had a notice on August 21st.

Q. That you were going to shut down when?

A. It was assumed that it would be shut down in 30 days, or on September 21st, but at that time we had the furnace down and the City did not appear to change the meter, or did they on the 22nd or on the 23rd of September.

Q. Well you had been notified we would not change it, had you not?

A. Not until October the 13th, where we was sure there would not be a meeting of the minds.

Q. Mr. Cunningham do you have in your file the original letter of—written by Mr. A. F. Darland, Superintendent of the Light Division, City of Tacoma, under date of September 14th, 1945, addressed to your company?

A. I think we have the letter. I wouldn't state as to the date. We have the file.

(Testimony of R. L. Cunningham.)

Q. Well are you in a position to produce that letter? [52]

A. I think counsel is.

Mr. Metzger: September 14th, '45. That is a copy. The original is not in the file.

The Court: You say the original has been introduced?

Mr. Metzger: No, I say the original is in the Company's file. I am substituting a copy and making no objection to the use of a copy in lieu of the original.

The Court: Yes.

Q. Handing you Defendant's Exhibit—identification A-3, and ask you: do you recognize that identification as a copy of the original letter?

A. It appears——

Q. Of September 14th from Mr. Darland—September 14th, 1945, from Mr. Darland, Superintendent of Light to your company?

A. It appears so.

Q. And in that letter, the first paragraph, the Company was advised that the City adhered to its former position, is that——

A. That is true.

Q. So that when you shut down on the 24th of November, you didn't consider it necessary to notify the City at all that you were shutting down?

A. Well I said repeatedly that we gave notice on August 21st [53] and this—beyond this date of September 14th there was still more correspondence between the parties. You made a statement

(Testimony of R. L. Cunningham.)

in this letter that you adhered to your position, as well the Company also had later letters in which they adhered to their position.

Q. But you had proceeded to act and shut down, had you not?

A. I think we had the privilege of shutting down. Are you talking about September, or when?

Q. After September 22nd, you proceeded to exercise what you thought was your right to shut down, did you not?

Q. Well, it was an interruption.

Q. Yes.

A. We have a right to interrupt our—the initial notice was based—if you read the notice it was based on a possibility of repair work, and we have the right, naturally under any operation, to interrupt our regular taking of power.

Q. I don't quite—will you explain?

A. You say shut down. I say it was an interruption in the taking of power up to——

The Court: Oh, I think the Court understands pretty fully that the plaintiff here was relying upon compliance with the 30-day notice by reason of his letter in August.

Q. You are aware of the fact that the City bases its billings [54] on a calendar month basis, that the meter—it is customary to read your meter on the last day of each month. Are you aware of that fact? A. I am aware of that fact, yes, sir.

Q. Well, then, being aware of that fact, why did you not notify the City on the 24th of November to come and read the meter?

(Testimony of R. L. Cunningham.)

A. Well, I contend that the City——

Q. Now just—— A. Well, all right.

Q. Why didn't you—why didn't you consider it necessary to notify——

A. September 21st was the day that the City should have reset the meter.

Q. Well they advised you that the would not reset it, isn't that true?

A. Well they did not reset it.

Q. Well then did you expect from that time on for the city to send a meter man over every day to find out whether or not you would shut down, or not? A. It wouldn't be necessary.

Q. Well how would they know?

A. They knew on September 21st.

Q. They expected you to be shut down then, didn't they? A. We were shut down. [55]

Q. Now this morning——

The Court: Did you offer in evidence the copy?

Mr. Carothers: Oh, yes, I wanted to offer in evidence the Plaintiff's—or Defendant's identification.

The Court: Any objection?

Mr. Metzger: No, your Honor.

The Court: It will be admitted in evidence.

(Whereupon a copy of letter referred to was then received in evidence and marked Defendant's Exhibit A-3.)

(Testimony of R. L. Cunningham.)

DEFENDANT'S EXHIBIT A-3

September 14, 1945

Ohio Ferro-Alloys Corporation  
Canton, Ohio

Attention: Mr. R. L. Cunningham,  
Assistant to the President

Gentlemen:

Receipt is acknowledged of your letter of August 30, 1945, in regard to the interpretation of contract for power for your Tacoma plant. After careful consideration of the same we have concluded that we must adhere to our position as set forth in our wire of August 27.

We believe that you have based your interpretation of the contract upon incorrect assumptions. The first assumption you discuss is not applicable for the reason that you did not in fact relieve the City of its firm power obligation when you shut down on April 26, 1944, since it was agreed in the correspondence with your Company and negotiations with your local representative that your rights for firm power would be preserved and that you might resume upon the giving of fifteen days notice. You were then contending, as you now are, under your second assumption, that Section 19 of the contract was applicable. This was not agreed to by the City. It is our understanding that your primary object in the negotiations was to preserve the firm contract for the additional load. In the final



(Testimony of R. L. Cunningham.)

adjustment each party reserved its position upon the applicability of Section 19.

The second assumption upon which your interpretation is founded is in our opinion also incorrect, in that you proceed upon the theory that Section 19 of the contract is applicable to the shutdown in question. To this we have never agreed. We think it plainly appears that your desire to be temporarily relieved of the additional load was due to the depressed market conditions for ferro chromium brought about by increased competition from high chrome content scrap.

Briefly, our position is as follows: Section 19 of the contract was not applicable. The shutdown occurred under the provisions of Section 10 of the contract, modified by the agreement to preserve your right to pick up the additional load.

The arrangement entered into amounted to no more than a commitment in advance on the part of the City that it would agree that the City would again deliver power for the second furnace on a firm power basis as provided in Section 10, and furnish the same upon 15 days notice. The contract and rate incorporated therein is fundamentally on a kilowatt-year basis with provision, however, for prorating for the second furnace load only "immediately following a full years billing at the specified rate." (See contract Section 4-b-3). Also see Section 10, where provision is made for dropping this additional load and where it is stated "if and when the corporation should drop its additional

(Testimony of R. L. Cunningham.)

6000 kilowatt requirements, either temporarily or permanently, and shall have made at least 12 consecutive monthly payments at the specified rate for this load the ratchet clause specified under 'billing demand' will be dropped proportionately." Manifestly the words "this load" refer to the additional 6000 kilowatts and the words "specified rate" refer to the rate for "this load," which is set up in Section 4 (b-3) where the \$17.50 rate is provided as absolute "except that the continuous and uninterrupted part year operations immediately following a full years billing at the specified rate shall be prorated."

There has not been a full years billing for this load since resumption of the same on February 26, 1945.

As heretofore stated, the contract rates were computed upon a firm kilowatt year basis; it was for this reason that the provisions were inserted in the contract permitting a prorating of the continuous and uninterrupted part year operation of the second furnace only when the same followed a full years billing at the specified rate. The City was purchasing power and selling to you at a loss when it agreed to permit resumption of service to your second unit. It anticipated a change in that condition upon the completion of its Nisqually project and had a right to and did rely upon a full years billing for this unit from the date of resumption of service. For the reasons herein stated, we cannot concede that you now have, either from a legal

(Testimony of R. L. Cunningham.)

or equitable standpoint, the right to escape the obligation of paying for the same as provided in the contract.

Very truly yours,

A. F. DARLAND

Superintendent of Light Division

AFD:jw

CC Mr. Jones

Corporation Counsel

[Endorsed]: Filed Sept. 5, 1947.

---

Q. Mr. Cunningham, when you were being questioned this morning regarding the Plaintiff's identification—what is that identification——

Mr. Metzger: I think it is A-4——

The Witness: A-3.

Mr. Metzger: 3.

Q. (Continuing): ——Plaintiff's identification 3, which is a graph which was taken from a recording meter, we assumed—Defendant's counsel assumed that that was a graph for the entire month of December. What period does that graph cover?

A. 6:00 a.m. on the 31st of December, and January 2nd, 4:00 a.m., '46.

Q. In other words, that record you have in your hand only [56] covers only covers one day of December, is that true? A. That is true.

Q. And you testified that during the month of December, that the demand did not exceed 6500.

A. That is true.

(Testimony of R. L. Cunningham.)

Q. From what record did you——

A. Well this—from what record? I mentioned we have three different records.

Q. Well now, you didn't—you weren't testifying from that particular record, because that only covered one day, isn't that true?

A. This particular chart is a record of the—I imagine you are talking about a disputed meter reading?

Q. We are just talking about what you say your record shows.

A. Well I still say our record shows there was no demand charged in excess of 6500 kw's in December. The source of my information——

Q. Well, you weren't testifying from the record that you produced here, were you?

A. I didn't produce this.

Q. Well you——

A. This is a record and it covers those days I mentioned to you. As to the balance of it, which would be at great length—it might be a rod long, is not—I don't have it here, no. [57]

Q. Did you examine it?

A. Yes, I examined it.

Q. Well, was it separate from that sheet?

A. Well it is now.

Q. Well, will you explain why it is separated from the rest of the record?

A. Because this portion of the chart covers the disputed time. The City's meter and our meter differed.

(Testimony of R. L. Cunningham.)

Q. Well, Mr. Cunningham, that is a daily record is it not?      A. It is a continuous record.

Q. Well, but that—that particular one that you produced covers the last day of December, did it not?

A. This was merely torn off from the rest of it.

Q. All right, answer my question. It only covers one day in December, does it not?

A. It covers 6:00 a.m. December 31st, January 2nd, 4:00 a.m.

Q. So it covers one day in December?

A. Yes.

Q. The other 30 days in December are not shown on that record, is that true?

A. That could not be. It couldn't be. It isn't physically possible to get them all on here.

Q. How long a time have you—has the company been keeping in operation such a recording meter?

A. As I recall, it was put in around June of 1945, this particular meter that puts out this chart.

Q. You have kept those records, have you?

A. Absolutely.

Q. There is no reason why you could not produce them here if necessary?

A. I don't think—I don't think counsel has them in his brief case. They would be voluminous.

Q. Well, I didn't mean that, but they are here in the local office, and you could make them available?

A. They could be produced in a reasonable time, yes.



(Testimony of R. L. Cunningham.)

The Court: Anything further?

Q. Mr. Cunningham, in computing the \$27,000.00 that you claim as a refund, what demand was that computed on?

A. Oh, you mean on how it was calculated?

Q. Yes.

A. Well, it is based on six days in November, 31 in December, 31 in January, 26 in February. It becomes 94—94 days. It becomes 94/365ths of a hundred and five thousand I think is the way it is calculated. A hundred and five thousand is based on 6,000 times seventeen fifty, which is the way the City have always billed for portions of months, which they did for February 26th, 1946. That is the way they calculated the refund of the two days that they gave us credit for. And it was also practiced in the [59] first shutdown, April 26th, 1944.

Q. From that time—during that entire period, as to the second furnace the charge was suspended—as to the second furnace, isn't that true?

A. I don't follow just what——

Q. Well there was no charge for the second furnace for that entire period of suspension in 1944.

A. There was a special arrangement outside of the contract.

Q. The demand was simply dropped down to 6500, isn't that true?

A. The City meter man came down on April 26th, 1944 and reset the meter.

Q. As I—then if you are figuring part month from November 24 on, why didn't you figure out the days in October that you didn't operate?

(Testimony of R. L. Cunningham.)

A. As I said before, we conceded the City \$18,000.00 for something that we didn't use, already.

Q. Well then you—you are conceding that you operated until the 24th of November, is that right?

A. I don't concede we operated. I concede there was a demand set by an operation of warming up period around November 24th which created a demand. From that date on there was no demand in excess of 6500. I still concede or say that on October and in November we used a very small portion of the power that we could have used under—or [60] did use.

Q. Well then, under the terms of the contract——

A. We operated——

Q. You were obligated—you recognize you were obligated to pay for that?

A. We operated 36 hours in November, and paid about \$9,200.00 for it.

Q. Well, under the contract you recognize that that——

A. Well, that—that is assumed and I don't think there is any argument about the fact that we gave the City \$18,000.00.

Mr. Carothers: That is all.

### Redirect Examination

By Mr. Metzger:

Q. Mr. Cunningham, there are one or two matters that seem perhaps to be a little confused. For example, when you first started up the second furnace along in November of 1941, and from that

(Testimony of R. L. Cunningham.)

period on until April of 1944, you say that you continuously took that second block of power and you paid, as I understand it, each month one twelfth of seventeen fifty times six thousand dollars.

A. Yes.

Q. Now during that period what was the fact; was this second furnace in continuous daily operation during all of that [61] time?

A. No, it had to be down for repairs, change-overs—probably down as long as two weeks at a time.

Q. All right. Now during all that time, you were taking the power under the second block you were paying for it whether you made any use of it or not, it was the Company's, the Ohio's risk, is that right?

A. That is true.

Q. And the same situation applies here after August 31st, 1945?

A. That is true.

Q. Up to the time you had finally discontinued the taking of that power?

A. That is true.

Q. Whether you actually used it or not, you are now assuming and conceding to the Court, it was at the corporation's risk?

A. That is true.

Q. Now, Mr. Cunningham, I asked you on your direct examination something about this demand limiter. How does that demand limiter operate? Does it operate with respect to the demand of one furnace alone, or the overall demand of the plant's taking?

A. It operates on the total load.

Q. The total load?

A. Total load.

(Testimony of R. L. Cunningham.)

Q. So that if that demand meter were set as you have testified, at 6384 kilowatts and was in operation, the plant could not have taken at any one instant more than 6300 kilowatts of power without shutting off the furnace? A. That is true.

Mr. Metzger: That's correct.

The Witness: That is right.

Q. I think you testified after November 24th, and continuously thereafter, not more than one furnace has operated. A. That is true to date.

Q. And there is no record that this demand limiter ever operated to curtail the demand or to shut off a furnace during that period?

A. Well, it would shut a furnace off after it got up to 6384.

Q. Have you any record that the taking did get that high?

A. Well the only record we would have is this recording meter—this recording.

Q. Well you can't tell from that, or you haven't observed from that whether there was apparently any cutoff—automatic cutoff by reason of the action of it?

A. During this disputed time there was no cutoff of power.

Q. Or at any other time, do you have any record or knowledge or indication? [63]

A. Well we have the records, that is true. We have the records and there would not be any—in other words, from the demand limiter, when the power got up to 6384 the demand registered that.

(Testimony of R. L. Cunningham.)

That is what the device was for, and it would immediately kick the power off and shut all power to that furnace off.

Q. Well I am asking you if there is anything in any record that you have that indicates that after November 24th, 1945, this demand limiter came into operation to prevent your taking exceeding 6384?

A. That is true. There is no record going over in excess of 6500.

Mr. Carothers: We object to—we think the record——

The Court: Oh, he has answered now. I will let the answer stand.

Mr. Carothers: Go ahead.

Q. Mr. Cunningham, just briefly, counsel has asked you if you received a letter from the City dated in September—I think its Defendant's Exhibit A-3. That wasn't the only letter you received during that period while this discussion was going on, was it?

A. No, it was not.

Q. There were other letters before and after that date from the City?      A. There was.

Q. And the interchange of correspondence on that subject did not terminate until the letter of October 13th, I believe, Plaintiff's Exhibit 2, wherein Mr. Darland said "We feel that little more can be accomplished by a further exchange of correspondence."      A. That is correct.

Mr. Metzger: That's all.



(Testimony of R. L. Cunningham.)

### Recross-Examination

By Mr. Carothers:

Q. Well now will you just name any letter written to you by anybody in the employ of the City during that period, other than the wire of August 27th, the letter of September 14th, and the letter of October 13th? Just what other letters did you receive?

A. I can't quote the dates. You have mentioned three of them.

Q. Will you examine your file and determine if any other letter was written to you by the City of Tacoma?

A. Counsel has the file.

Q. I will hand you a file, examine it and state what telegrams or letters that you find from the City of Tacoma.

A. Well, I don't question—what is the—— [65]

Q. Well counsel asked—said there was correspondence going on during this period from August 31st to October 13th, other than had already been mentioned. What was it?

A. I made no statement to that effect?

Q. Well——

A. That is correspondence. There was wires, telephone conversations and two letters that you quoted yourself.

Q. Now you admit that there was just those two letters, is that right? And the wire.

A. There was a wire. There was telephone con-

(Testimony of R. L. Cunningham.)

versations; two letters that I remember because you mentioned them. I can look through the file if you wish.

Q. Now you said there was other letters.

A. I didn't say there was other letters.

Q. Well you answered Mr. Metzger's question and said there was other correspondence.

A. You are becoming too technical. I didn't name the letters.

Q. We are asking you to name them now.

A. Well do you want me to recite the whole affair again? I mean, each letter and wire?

Q. If you find in your file any correspondence or telegrams from the City of Tacoma, between August 21, 1945, and October 13, 1945, other than the one telegram and the September 14 letter, why, that's what we want. Any other correspondence from the City. [66]

A. First, on the 24th I talked to Mr. Darland on the long distance telephone.

Q. All right, now stop right there. That's the only——

A. That's the first—after the first notice.

Q. Yes.

A. 21st, 24th, and then there is a wire.

Q. The 27th.

A. Wire received from the City on the 27th. A wire from myself to Mr. Darland on the 30th of August; a letter on August the 30th; the letter from the City of Tacoma on September the 14th; a letter to the City of Tacoma on September 25th, and the October 13th letter from the City to ourselves.

(Testimony of R. L. Cunningham.)

Q. Now on this demand limiter—load limiter we will call it, I suppose, that's a device that was entirely under your control over there, was it not?

A. Well, it was under the operator's control.

Q. It was under the Company's control and not the City?

A. It was under the Company's control.

Q. Yes, and it could be set as you saw fit, is that right?

A. It would be set at whatever furnace operation we was running on. It was set at 6384 for 6500 operation, or for twelve five we would probably set at for 12,000.

Q. Or you could set it at 7500 if you saw fit, couldn't you?

A. If we wished to breach our contract we might, yes. [67]

Q. You said this morning that these instruments were all in good shape, did you not? A. I did.

Q. Don't you know it to be a fact that on numerous occasions your local men over there contacted City representatives and asked them to check your instruments; that you were having trouble with them? Do you know anything about that?

A. The City I think, had the privilege of going over our amp meters and volt meters on the furnace board at various times. I don't believe the City ever repaired the GMS 11 demand limiter.

Q. Well now you have not exactly answered the question. Do you know whether or not it is a fact that your local men over there, requested the City

(Testimony of R. L. Cunningham.)

to come in and go over these various instruments; that they were having trouble with them, they couldn't get them operating correctly?

A. Well it all depends on what instrument you are talking about. The City repaired some instruments. They didn't repair the GMS 11 demand limiter. It was taken care of by the manufacturer, the General Electric, nor the Westinghouse recording meter, the City never had in their shops.

Mr. Carothers: That's all. [68]

Mr. Metzger: That's all.

The Court: Just a moment. It is your contention that you were relying upon this letter of August the 21st, I think it was, of 1945, as your notice——

The Witness: Yes, Your Honor.

The Court: Under the terms of the contract, and you recognized a liability to pay for 30 days after you served notice.

The Witness: Yes, sir.

The Court: So in that letter you didn't fix any date.

The Witness: No, it was up to the City. We interpreted it to be at least 30-day notice. Now the City would have to agree too, and it was assumed that it would have occurred on September 21st, and we were ready for that suspension on that day.

The Court: But actually you had occasion to operate this second unit for some considerable time off and on following that, up until November 24th?

The Witness: Well the log—the operating log

(Testimony of R. L. Cunningham.)

which I have here, it was operated—it was operated starting on the 24th of September, and it operated till a portion of October the 7th, and then we——

The Court: Now I think you have given those dates. [69]

The Witness: Operated 36 days in November—or 36 hours.

The Court: So you didn't definitely shut down and not operate that unit at all any more until November—sometime in November.

The Witness: November 24th is the last overlap.

The Court: And during all of that time there was more or less of a dispute between your concern and the City, as to when this matter was going to be finally concluded and you would quit operating and be relieved of liability?

The Witness: That is right, Your Honor.

The Court: Well now, on November 24th, was there any representative of the City over there?

The Witness: No, there wasn't any.

The Court: Was there any word sent to them the plant was down then permanently and definitely?

The Witness: No there was not. Their meter man would arrive on November the 30th to read the meter. That is as near as——

The Court: At the end of the month?

The Witness: At the end of the month.

The Court: And you didn't talk to him or don't know what was said to him?

The Witness: Well, at the end of each month



(Testimony of R. L. Cunningham.)

he drops the demand back to zero, and it's a fresh start, as if we started the plant up that day, in a sense. He drops this——

The Court: Well, what I am trying to get at, aside from your letter advising the City you were going to terminate your liability in accordance with the terms of the contract in 30 days, and that didn't occur because of differences and misunderstandings. Now then, when you did terminate the use of electricity on November 24th, but the City apparently wasn't even informally advised until November the 30th when their representative appeared there to read the meter.

The Witness: Yes, they were not informed on September twenty—they were not informed that the suspension took place on the 24th of November, but the nearest to that would have been November 30th.

The Court: And then I assume they came of course, and read the meter again?

The Witness: December——

The Court: December——

The Witness: January, February and they came again on February 26th.

The Court: Well was there any reason why they weren't notified either on the 24th or 30 days preceding the 24th of November that this unit was going out entirely and that you were going to stand on the contract?

The Witness: There was no notice 30 days prior to November 24th.

The Court: But was there any reason why there wasn't?

(Testimony of R. L. Cunningham.)

The Witness: There was no reason. We still were protesting these payments, and probably hoping that the City would agree to a suspension.

The Court: But you knew the City was taking the position that they were going to hold you for 12 months from the time you started up in February, '45 to February '46?

The Witness: That was in these letters.

The Court: Well did these letters or these telegrams that are not in evidence here, anywhere indicate that you were going to stand on the 12-month period of continuous service as being that before conditions arose?

The Witness: That was our contention in all these letters, the 12 consecutive months meant the initial 12 consecutive months, and that had already passed. It was part of the 27 consecutive months that we had operated, and the shutting down on September 21st [72] was a—we had the right to shut down on that date.

The Court: Well of course you notified them that you would suspend operations. You didn't say that in 30 days from the date of this letter,—

The Witness: No.

The Court: —but you just merely said you were giving them 30 day notice, but in that letter of course, you didn't say that was going to be a permanent shutdown. You said that was for the purpose of meeting certain conditions that you had in the plant.

(Testimony of R. L. Cunningham.)

The Witness: Well, if they would have agreed—

The Court: So what I'm trying to get clear, did you ever either directly tell them, or someone representing the Ohio Company, to your knowledge, or did they ever say anything to you that there was going to be a permanent shutdown of this unit—

The Witness: Not permanent—

The Court: —before it actually occurred—that is, permanent within the bounds of reason. You always have the right to later negotiate for power again and start resuming. That's under your contract.

The Witness: Well when we relinquished the power by notice of August 21st, we were under—we knew to get the power back they would have to mutually agree to give it to us, under the terms of the contract. [73]

The Court: No, but they didn't accept your relinquishment in August. They disputed it, and there is where your differences arose, and they didn't have the benefit of your relinquishment, so far as *having ready* to serve, being relieved from the ready to serve obligation until they read your meter on November the 30th, and what I am trying to find out is whether then, was there anything there then said or done, that this plant—this unit is down for an indefinite period?

The Witness: Well, there is nothing more than the fact that we were operating the one furnace, and they would recognize that, whether there was anything said verbally to them when they arrived at the plant, or—

(Testimony of R. L. Cunningham.)

The Court: You assumed that they would recognize that. That's all, I just wanted to——

Mr. Carothers: I would like to pursue that further if I may.

By Mr. Carothers:

Q. The meter was read by the City of Tacoma's representative on the 30th of November, wasn't it, —or 30th of November. Are you claiming that any written or oral notice was delivered to the meter reader at that time that you weren't going to operate in December?

A. I didn't claim that.

Q. Well I say are you now claiming that?

A. I don't believe that I have claimed that.

Q. Well then, as I recall it, the meter reading for the month of November—the demand showed something over ten thousand, is that correct?

A. That is correct.

Q. So that our meter reader would—he wouldn't know whether you were going to go on and operate again in December, or not, would he, from that reading?

A. He couldn't assume that, no.

Q. So that unless you specifically notified him orally or in writing at that time, why, the City would have no way of knowing that you had shut down on November 24th, or that you intended to stay down, isn't that true?

A. He had notice on August 21st, and——

Q. Well now—okeh, but subsequent to that.

A. Well that's the only notice. We gave notice on August 21st.

(Testimony of R. L. Cunningham.)

Mr. Carothers: That's all.

Mr. Metzger: That's all, Mr. Cunningham.

(Witness excused.) [75]

---

### WILLIAM PRITZ

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Metzger:

Q. Will you state your name and connection with the Plaintiff, Ohio Ferro-Alloys Corporation?

A. William Pritz, works' manager.

Q. Works' manager where?

A. For the Tacoma plant.

Q. The Tacoma plant. How long have you occupied that position?

A. Since the 10th of October, 1946—or '45.

Q. 10th of October, Nineteen——

A. '45.

Q. '45. Mr. Pritz, what devices does the Ohio Ferro-Alloys Corporation have for the determining of the demand—electrical demand imposed on the City's facilities, or limiting that demand?

A. Well, we have a——

Mr. Metzger: Speak a little louder, please. I can hardly hear you.



(Testimony of William Pritz.)

A. (Continuing): We have a Westinghouse recording demand limiter, which records the total consumption of the [76] plant at any given time, and had a GM-11 General Electric demand limiter, which also recorded the plant consumption.

Q. Beg pardon?

A. Which also recorded the amount of power that was being used at any time.

Q. You say it recorded? A. Yes.

Q. Did it leave any written record?

A. The Westinghouse left a written graph by the half hour.

Q. Did the General Electric demand limiter leave any written record?

A. No, it did not leave any written record.

Q. Now, those devices were in operation, were they, since you've been there? A. Yes, sir.

Q. At the plant? A. Yes, sir.

Q. Have they been in good operating condition, or otherwise, during that period?

A. The meters, to the best of my knowledge, were constantly checked to the best of our ability, and if they were not in good condition, or we had any idea that they might not be, why, we had them checked immediately.

Q. By whom?

A. Usually by the General Electric representative, and one [77] of our men who had experience in that type of work.

Q. Well, now, Mr. Pritz, as I understand it, this Westinghouse demand limiter, you say, makes a written record every half hour.

(Testimony of William Pritz.)

A. It records it on a graph. It records the power reading on the graph.

Q. Oh, a graph? A. Yes.

Q. What is—your duties on occasion cause you to examine that graph?

A. Well, I check it constantly, three times—well, three times in 18 hours,—16 hours.

Q. I see. Every day as I take it?

A. Every day.

Q. The graph from, we will say September, 1945, to the present date would be a very long sheet of paper if it was a continuous sheet of paper, I take it?

A. Yes, the rolls that we have I think run around three weeks—three or four weeks.

Q. About how many feet to a roll?

A. I don't know. There must have been 40 or 50 feet.

Q. 40 or 50 feet?

A. They are quite long.

Q. Now this identification marked Plaintiff's 3, that as I understand it, is a sectional lay of this recording graph [78] that the Westinghouse recording meter makes? A. That is correct.

Q. Can you identify the days covered by that graph—that side of the graph on which the identification Plaintiff's Exhibit 3 is marked?

A. I can.

Q. What days was it?

A. It was the 31st to the 2nd of January—31st of December to the 2nd of January.

(Testimony of William Pritz.)

Q. What years?

A. '45 and '46, one day in '45 and a couple of days in '46.

Q. I see. Now, in your examination of this recording graph—maybe I have asked this question, if I have, I apologize, but was there any record of any demand on that graph between November 24th, 1945, and the present time in excess of 6500 kw.?

Mr. Carothers: Just a minute, your Honor, we object.

The Court: Oh, he may answer. The objection will be overruled.

Mr. Carothers: To answering that question. The record is the best evidence.

The Court: Let's get along.

Mr. Metzger: Do you understand the question, [79] Mr. Pritz?

A. No, I don't understand that question. I would like to ask one question. When was the 10,000 demand recorded, in '45?

Mr. Metzger: Well, according to the pretrial order it is——

The Court: Ten thousand plus was recorded in November, 1945.

The Witness: Well, that would show on this sheet.

Q. Well, I am asking you, after the 24th day of November.

A. Well, after the 24th day of November——

Q. 1945, was there any recorded demand in excess of 6500?

(Testimony of William Pritz.)

A. Well, to the best of my knowledge it was never over 6500 since the 24th of November.

Q. And after November 24th, 1945, at what figure or number of kilowatts was the demand limiter set? A. I had the men set it at 6384.

Q. Six thousand three hundred and eighty-four?

A. Yes, sir.

Q. It has been continuously set at that since that date? A. Yes.

Mr. Metzger: That is all. [80]

### Cross-Examination

By Mr. Carothers:

Q. Well, this demand limiter is susceptible to being reset very easily, is it not?

A. Yes, sir. Well, not too easy. It can be reset.

Q. And that is entirely under the company's jurisdiction over there? A. It was.

Q. Yes. I assume that this entire record taken from this recording meter is available?

A. Yes, sir.

Q. And can be inspected, is that true?

A. Yes, sir.

Q. Where is it?

A. Well, I think we have it in our plant, in the main office.

Q. Can arrangements be made so representatives of the City may inspect that record?

A. Yes, sir.

Q. How do you explain the fact that out of the middle of that record there is torn two or three days only?

(Testimony of William Pritz.)

A. The reason for that is the demand was all right up and through the 31st of December, when the City's demand meter was set, at a reading higher than 6500, so that was the period in question, I personally tore this off, myself, or it was tore off and we sent it in. I [81] marked it off. I sent the whole roll, but I marked the period where the demand meter showed that it was sent up, because I checked the meters personally myself, and from the time I last saw it until when I came back again, the meter had been kicked up.

Mr. Metzger: Which meter are you talking about?

The Witness: The City's meter. That is why I noticed the chart. That is why I checked our chart to see when and if any—our chart showed the reading was at that time, as I checked it three and four times in eighteen hours.

Q. Well, so far as the City's demand meter is concerned, it has no way of determining—the meter reader has no way of determining what day of the month that that maximum demand was reached, isn't that true? A. That is correct.

Q. So that what your recording meter may show on December 31st, does not prove anything so far as in the month the maximum demand is concerned, isn't that true? A. That's right.

Q. You were—when you were checking your meter you checked the City's meter, too, is that correct?

A. That is correct.



(Testimony of William Pritz.)

Q. And did you find a different demand on the two meters? [82]

A. The practice of course would be to check the City demand meter first, because that is what we are billed by.

Q. Yes.

A. And then if the City's demand meter was all right, well I would just pass over ours, because we were interested in what we would be billed on. They were at that time, they were close to one another, so it was easy to read both of them practically at the same time.

Q. Are you a—what is your trade? I appreciate that you are——

A. Well, I'm——

Q. Employed over there, but what is your actual trade or profession?

A. Furnace operator, you might say.

Q. You are not a meter expert at all?

A. No, sir.

Mr. Carothers: That's all.

Mr. Metzger: That's all, Mr. Pritz.

(Witness excused.)

Mr. Metzger: I may say, your Honor, there has been some contention made by the City and it's incorporated in the pretrial order, that there were demands [83] higher than 6500 occurring after November 30th. I think that is a matter of proof by the City if they are standing on that point. Now I don't want to go into it in our case in chief, be-

cause I think that is a matter for the City to prove, but I don't—a lot of it has been touched upon in cross-examination here, but I have this record of the days I think that are in question, but I should not want to be precluded from rebutting, if the City goes into that question.

The Court: I don't think you should devote too much time. You ought to be able to agree pretty well. That's one of the purposes of the pretrial conference on those facts. If the City has some documents that indicate there was a use of electrical energy in excess of 6500 kws. during these months following November 24th, there is no reason why it should be kept under cover, and if, likewise, the plaintiff has some record——

Mr. Metzger: We are not seeking to keep anything under cover. We have the record here for the days we think is in dispute.

The Court: And that is what I had hoped, that all those matters—I hoped you worked them out between yourselves. It appears to the Court at this stage of the case, that the major issue of course is [84] first, and I would want some evidence on this, as to whether this 12-month period as provided for in this contract, had actually run when this situation by reason of the government's action arose, and a determination on that issue is whether that falls under Section 19 of the contract.

I haven't had any evidence thus far as to just what this war order was.

Mr. Metzger: Well, that's true, we'll offer that, your Honor.

The Court: And then, be that as it may, whether there was anything in the facts, outside of the first written notice of an intention to be relieved from liability for six thousand kws. for the second unit, whether there was anything in relation to this dispute that was rather long drawn out, and at times were quite far apart, but could be taken as constructive notice.

Mr. Metzger: Yes, sir.

The Court: That the plaintiff had ceased and when that occurred, and that's why the Court asked the questions I did.

Mr. Metzger: I understand.

On the first point that your Honor has mentioned here, the record as made by the pretrial order that this second furnace, or the load for the second [85] furnace, was taken originally in November, 1941—taken and paid for continuously for 27 months before the suspension under the—by reason of the War Production Board's orders, or——

The Court: I appreciate that.

Mr. Metzger: So that period of 12 consecutive months was then long passed.

The Court: Well, the Defendant contends that that suspension after 27 months was the end of that transaction and there was a new one beginning, so the parties themselves went outside of the written contract and made an adjustment there——

Mr. Metzger: That's right.

The Court: —and they took this up and that the new one—the new obligation commenced in February of '45, and automatically thereafter continued until '46, before the 30-day notice could become an effective notice.

Mr. Metzger: No, I think neither party contends that, your Honor. The question—the 30-day notice could be—I mean it could be effective all right, except as to the question of payment. Now if you mean effective to reduce payment, then you are correct.

The Court: Well, that is what I mean.

Mr. Metzger: Well, now, at this time we would [86] like to offer the testimony of Mr. R. D. O'Neil, which was taken—his deposition was taken by stipulation of counsel. He had to be in Spokane. He was subpoenaed as a witness on behalf of the Plaintiff.

The Court: Very well, you may proceed.

Mr. Metzger: I don't know what your Honor's practice is about depositions.

The Court: I haven't any rigid practice. I prefer to have one person take the witness stand and the other read and the other answer.

Mr. Metzger: If I may be construed to be the witness then.

The Court: Very well.

Mr. Metzger: This deposition was taken under stipulation which appears in the deposition.

The Court: You don't challenge the deposition?

Mr. Carothers: Your Honor, we renew the ob-

jection we made at the time of the taking of the deposition. This deposition is the deposition of the former Commissioner Robert D. O'Neil, and the testimony that is embodied in the deposition deals with conversations that he had with representatives of the Ohio Company, during the period of negotiation leading up to the execution of the contract, and also that his understanding and his thoughts and ideas and opinions about [87] the terms of the contract, itself, and we object on the ground that—to any of this testimony on the ground that the contract is plain and the language of the contract is plain and unambiguous and not susceptible of oral testimony to vary the terms thereof, and also that any—particularly as to those conversations during negotiation—preliminary period of negotiation were not material, because the final contract as drafted expresses the intent of the parties.

The Court: Objection will be overruled and exception allowed.

You may proceed. [88]

---

(Deposition of R. D. O'Neil.)

“R. D. O'NEIL

produced as a witness on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

“Direct Examination

“By Mr. Metzger:

“Q. Your name is R. D. O'Neil?

“A. Yes, sir.



(Deposition of R. D. O'Neil.)

"Q. And you are presently residing at Raymond, Washington? A. Yes, sir.

"Q. And your occupation there is what, Mr. O'Neil?

"A. Manager of the Public Utility District No. 2 of Pacific County.

"Q. How long have you held that position?

"A. Since December 23, 1944.

"Q. And if it is not too embarrassing a question, how old are you now, Mr. O'Neil?

"A. I was sixty years old the 3rd day of last December.

"Q. Were you at one time an elective officer or commissioner of the City of Tacoma?

"A. I was.

"Q. What office did you hold and when?

"A. I was Commissioner of Public Utilities from, I believe, [89] the 3rd day of June, 1940, until the 5th day of June, I believe it was, 1944, if I remember the dates right.

"Mr. Carothers: That is near enough.

"Q. During that time, Mr. O'Neil, did you negotiate, on behalf of the City of Tacoma, and execute for the City, a contract for the sale of electrical energy to Ohio Ferro-Alloys Corporation, plaintiff herein?

"A. I negotiated the contract, I believe. If I am right, Howard."

Mr. Metzger: By "Howard" he's referring to Mr. Carothers.

(Deposition of R. D. O'Neil.)

"A. It had to be passed on by the City Council, so I guess the execution of it might be by the City Council. They had to approve it.

"Q. It had to be approved by the City Council?

"A. I negotiated the contracted.

"Q. You negotiated the contract, but to your recollection it was approved by the City Council?

"A. It had to be approved.

"Q. And was later signed by you on behalf of the City?"

Mr. Metzger: There was no answer to that question. There was an interruption there.

"Q. Now, showing you a document which is entitled 'Contract between City of Tacoma, Department of Public Utilities, Light Division, and the Ohio Ferro-Alloys Corporation,' [90] recites that it was executed on March 21st, 1941. I will ask you if you recognize that document?

"A. Well, it is my signature. Here is the City Clerk's name and the Mayor's name, and other than that, I guess——"

Mr. Metzger: Then Mr. Carothers interposed.

"Mr. Carothers: We admit that the document is a duplicate of the original contract in question.

"Mr. Metzger: For the purpose of identification may we substitute for that, a typewritten copy thereof, and have it marked as Exhibit 'A'?

"Mr. Carothers: We consent that a copy may be substituted for the original and marked.

"Mr. Metzger: Would you mark this Exhibit 'A' for identification, please?

(Deposition of R. D. O'Neil.)

“(Whereupon said contract was marked Plaintiff's Exhibit ‘A’ for identification.)

“Q. (By Mr. Metzger): Mr. O'Neil, with whom did you negotiate this contract?

“A. Well, Mr. Jones, I believe, was the first representative of the company to come to my office in regard to that contract. Then, later on, Mr. Weitzenkorn, and I don't know——”

Mr. Metzger: He then turned to Mr. Carothers and said:

“Was there another party that was a third representative [91] came to you?

“Q. This is more or less informal, but you will have to testify to your recollection.

“A. Well, there were those two men, but I am not sure whether there was this third company representative.”

Mr. Metzger: Presumably this third company representative.

“I don't know; I don't remember whether there was a third one. I know Mr. Jones came first, and then Mr. Weitzenkorn, and we both got into the negotiations over a very considerable period on the thing.

“Q. Where did these negotiations take place?

“A. At my office on the fourth floor of the City Hall.

“Q. Do you remember about the date of the last negotiations?

(Deposition of R. D. O'Neil.)

“A. No, I can't recollect the date. The date that you told me there would be as near as I could say.

“Q. Well, actually wasn't it a fact, Mr. O'Neil, that these negotiations took place, and there was a meeting of the minds between yourself and these representatives of Ohio for quite a considerable period of time before the formal contract was written up, and the ordinance passed, and the contract signed?

“A. My recollection is, I think it was between three weeks and a month from the time we first—about three weeks to a month, somewhere in there, if I recollect right. The [92] meeting lasted over that period of time.

“Q. Mr. O'Neil, this contract provides for furnishing, by the City, of two different blocks of electric energy, one of 6500 kilowatts, and one of 6000 kilowatts.

“A. I don't know as we would call it two different contracts.

“Q. This one contract provides for the furnishing of two different blocks.

“A. The basic contract was for 6500 kws. Then, the additional block was based on taking the first 6500. In other words, they could not have got the second one without the first one being taken, and they were allowed one 6000 kilowatt block that would not be governed by the same circumstances and the same conditions as the first one, I believe.

“Q. I see. In other words, the contract provided that—it was agreed to provide initially that

(Deposition of R. D. O'Neil.)

Ohio would take, for a term of ten years, a block of 6500 kilowatts?           A. Yes.

“Q. Of power?           A. Yes.

“Q. And to insure the performance by Ohio of that part of the contract, an escrow fund was provided, is that correct?

“A. Yes, it would be paid for during the first four years of the contract, and to be then held in escrow until the end of the seven years and then paid back in quarterly installments, [93] and, at the end of the ten years, the whole amount would be returned to the company, of the amount of the escrow. I think that is it.

“Q. Then, the second block of power was to be furnished on different terms than the first block?

“A. Yes, in the second block of power there was no escrow required on it. The provisions——

“Mr. Carothers: Just a moment. We object to him reciting the provisions unless he is going to recite them verbatim as they are in the contract. The contract speaks for itself as to the provisions of the second block of power. We object.”

The Court: Oh, I think I will let you read his answer.

Mr. Metzger: Well, he didn't—he made no answer, because at that point I interposed another question.

The Court: Very well.

Mr. Rybolt: Mr. Metzger said: “All right. Your objection will be noted, of course.” Then this further question:



(Deposition of R. D. O'Neil.)

“Q. Mr. O'Neil, I don't want to interrupt your answer, but I wish you would state, as near as you can, what was said and agreed to in substance by yourself and the representatives of Ohio Ferro-Alloys Corporation, with respect to [94] the second block of power when the contract was agreed upon, what was to be incorporated in the contract?”

Mr. Metzger: At this point, Mr. Carothers makes the objection that he orally renewed—before.

The Court: Well, I think it is subject to objection, that it would be an attempt to vary the terms of the agreement unless there is something ambiguous about it. Is there any contention that his answer is different in substance from the terms of the contract? I ask that because it might tend to make it easier for the Court.

Mr. Metzger: Well, if your Honor please, all this whole question has already been testified, when we asked for this suspension power, the City's reply through Mr. Garland was that they didn't know how to interpret the contract. Then——

The Court: Well, I don't think I want an extended argument on that at all.

Mr. Metzger: We think the contract is ambiguous on its face. We're only trying to explain the 12 months' period——

The Court: Well, go ahead and read the answer, whatever it is, and I'll allow exceptions.

Mr. Rybolt: Mr. Metzger said: “Go ahead, [95] Mr. O'Neil.”

“A. Well, in the second part of the contract,

(Deposition of R. D. O'Neil.)

the block that—if I can remember what went on—first, I believe Mr. Jones will agree with this: In the copies that were re-written of the contract from time to time, that they could ask for as many blocks of six as they wanted to, and I ruled that there would only be one block attached to that initially, which would be contingent to the first initial block of 6500 that they contracted for. In the second block they were not required to deposit any amount in escrow. They were to pay for the power monthly, but they were required to use it for a period of not less than one year before they could drop it; in other words, before they could drop that second block, and that upon dropping the second block at any time, it''

Mr. Metzger: No, I'm not reading this—"but they were required to use it for a period of not less than one year before they could drop it; in other words, before they could drop that second block, and that upon dropping the second block at any time, it would be the City's sole decision as to whether they would come on again or not. In other words, the City could say no, and the company would have no rights under the contract for the second block. I might cite to you my reasons for that, if it is material. [96]

"Mr. Carothers: No, I object.

"Mr. Metzger: The reasons would not be material. Go ahead and omit the reasons.

"A. All right. Keeping this in mind that the City had the sole control, it was the intention that

(Deposition of R. D. O'Neil.)

they would go ahead and use it; if they dropped it, if the City wanted to take it on again, they would do so, if they did not, to tell the company no, or they might make any additional stipulations regarding the coming on again that they might wish to make at the time that they picked it up after having dropped it once. Now, other than that, I don't think there was any stipulation made regarding the second block, not that I know of.

“Q. Was there anything said by you, or something to the effect that if the City permitted Ohio to resume the taking of the second block that they would then have to pay only for the energy used, or pay for it only during the time they took it?

“A. I don't think that question ever came up at that particular time, because keeping in mind again that the City had the sole control over the matter, why it was not my—at least, it did not occur to me at that time that there would be anything arise about the second period coming up on it. On the operation of a furnace of that kind, they don't usually start up for a period of three months and run it. Of course, that could have happened, but we did require the first year because of our transformer installation, so we would be guaranteed some return to pay for that investment, and in the labor we put on it. So, we did require the first year, at least one continuous uninterrupted portion of it.

“Q. Now, Mr. O'Neil, taking a look at this contract—

(Deposition of R. D. O'Neil.)

"The Witness: This is the first time I've seen these copies since then, so my memory has to be pretty good.

"Q. Now, the contract, in several places speaks of Article 10-A, which provides, "The corporation"—meaning Ohio—"may permanently drop its additional six thousand kilowatt power requirements, at any time, after one year's billing (twelve consecutive months) at the specified rate." Now, in the next paragraph it says, "If and when the corporation should drop its additional six thousand kilowatt requirements, either temporarily or permanently, and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load"—then, it goes on to something else.

What was your understanding and intention with respect to this twelve consecutive months? Was that to be one payment, or one time only, or more than one?

"Mr. Carothers: Just a moment. We object [98] to that testimony. It is up to the Court to construe the language in the contract, and not for Mr. O'Neil to construe the language, or what his intention was. The language speaks for itself. I object to any testimony as to what his understanding of that provision was that was just read."

The Court: He may answer. The statement made by counsel is substantially correct. If the contract can be construed as written, it must be—I'll let him answer and if I consider it material, I'll use it, and if I do not, I'll reject it.

(Deposition of R. D. O'Neil.)

"A. Well, for my part, I feel they referred to the initial beginning twelve months period. Now, that was my understanding at the time, of course.

"Q. That was your understanding at the time?

"A. Yes.

"Q. Now, not to put words in your mouth, but to clarify this, see if I am correct in what my understanding is of what you have said: That it was your understanding, at the time this contract was negotiated and when it was executed, that this provision for payment for twelve consecutive months applied to the initial taking of the 6000 kilowatt block, is that right?

"For the reason as just stated in the contract, that the City had the sole decision as to whether it could come on [99] again; we might decide that we would let them have power for six months, or we might allow them to have power for another year period. So, having the full control of the City for that additional load, whether they come on again after dropping this six thousand kw., we could make any stipulations we might desire regarding the continued use of that condition.

"Q. So, that is the way the contract was understood and drawn, that the twelve consecutive months taking applied only to the initial taking?

"A. As I felt about it, yes.

"Q. And that was discussed with representatives of Ohio?

"A. I don't remember whether we discussed that. We discussed a lot of things in three weeks. My memory is not good enough to recall.



(Deposition of R. D. O'Neil.)

“Q. Well, I don't know when I asked you”—it should be whether, I believe—“I don't know whether I asked you that question before”—no, I'm wrong, I'll read it again. “Well, I don't know when I asked you that question before for clarification, whether my understanding was correct. I thought you nodded your head affirmatively.

“A. Which question was that?

“Q. When I said that it was my understanding of your statement that this provision in the contract for payment for twelve consecutive months applied only to the initial [100] taking of the second block. A. I said yes.

“Q. All right. That is just to make sure.”

Mr. Rybolt: Then an instrument was marked Exhibit “B” for identification, and Mr. Metzger said: “It is our understanding with you that I may use copies rather than the originals, Mr. Carothers?”

“Mr. Carothers: That is entirely all right.”

My Rybolt: Then Mr. Metzger asks this question:

“Q. Mr. O'Neil, I hand you a copy of what purports to be a letter from you to Mr. Weitzenkorn. I wish you would look at it and tell me if that is a letter that you wrote to Mr. Weitzenkorn?

“Mr. Carothers: If that is the October 4th letter, we admit that it is a copy of the letter, October 4th, 1941, by Commissioner O'Neil to Mr. Weitzenkorn.

(Deposition of R. D. O'Neil.)

“The Witness: That is my letter but it is not my signature. My signature has been copied, of course.

“Mr. Metzger: Yes, it is merely a copy. We offer the same in evidence.

“Mr. Carothers: No objection.”

Mr. Rybolt: Do you have those letters, Mr. Metzger?

Mr. Metzger: Yes, they're attached to the [101] deposition.

Mr. Rybolt: Oh, they are. All right.

(“Whereupon, Exhibit ‘B’ was offered into evidence.”)

Mr. Rybolt: Would you care to look at them at this time, Your Honor, or——

The Court: There's no objection, I understand.

Mr. Rybolt: No.

The Court: So they will be admitted.

Mr. Rybolt: The next question by Mr. Metzger:

“Q. Mr. Weitzenkorn, to whom that letter is addressed, is the Weitzenkorn to whom you have previously referred as one of the negotiators on behalf of Ohio Ferro-Alloys Corporation?

“A. It is.

“Q. Mr. O'Neil, what was the purpose of the City's requirement that Ohio must pay for a full year on the initial taking of the 6000 kw. load?

“A. Well, any power company in picking up a load of that kind, must make certain expenditures as the labor of installation, possibly the investment in the transformer bank, so they must be guaranteed a certain amount of return in order to justify the expenditure.

(Deposition of R. D. O'Neil.)

"Q. Yes. [102]

"A. So, we put a year there as a minimum amount that we could expect for the expenditure we went to, you see.

"Q. All right. In other words, that payment of a minimum of a year was to safeguard the City against the investment that it might have to make to serve that load?

"A. At least in part. It might not safeguard it entirely, but it would go a long ways to do it.

"Q. But, you deemed it, on behalf of the City, sufficient to safeguard that? A. Yes.

"Q. Once that was paid, there would probably be no additional investment on the part of the City to serve that load if it was later served?

"A. No, however, with these qualifications: If, in the meantime the City had taken on other loads that took up this slack, then, of course, the City would have the right to say, "You cannot have the load because—." In other words, suppose that we wanted to take on the power again after this year was up and the City had sold the power, committed it to somebody else after they had dropped it; then, of course, the City might have gone to considerable expense to get the additional block, but they also had the right to refuse to serve it if they wanted to.

"Q. That is right, under the contract they only had to serve [103] the additional block after it had been dropped once if, in the City's judgment, they had surplus power.

(Deposition of R. D. O'Neil.)

"A. Or, were capable of doing so under normal circumstances, you see.

"Q. Yes. That was solely in the City's judgment?

"A. If I read the contract right, or remember it right, why that was it.

"Q. And the City, in selling surplus power for this second Block, would be selling power that the City had available, but which it was not otherwise realizing any return upon, is that right?

"A. I don't know whether I would say it in exactly those same words or not, but it was power that we could procure, or that we were generating ourselves, which was advantageous to sell to them under those conditions.

"Q. Well, Mr. O'Neil, let me see if I again understand you. If, in the City's hydro-electric generation, it had a generating capacity which was not being used up by the normal demands on the City, that the excess of that generating capacity over the normal demands, as you put it, would be surplus power?

"A. That is the term commonly used.

"Q. That is the way you would understand it, I mean, surplus power would include that condition, at least?

"A. Yes, that would include that condition.

"Q. And to sell surplus power of that kind to Ohio would be merely giving the City a return on generating capacity which would otherwise be unremunerative, is that not right?

"A. That is right, yes.

(Deposition of R. D. O'Neil.)

"Q. And that power, in other words, cost the City what you might call the incremental cost of additional labor, if anything, to service it?

"A. Yes, I think that is right also.

"Q. That is right. In other words, the normal load would be carrying all the overhead, the investment charges and the general charges of operation; this surplus would only cost whatever additional men, if any, you might need, and what bookkeeping there might be, for meter reading, if any there might be, extra?

"A. Normally the way we look at it, there will be no added operating cost, or would be very inconsequential.

"Q. Inconsequential, that is right. That is the kind of power the contract contemplated would be furnished Ohio if the second block of power was subsequently taken on?

"A. Even if it was dropped and picked up again, you mean?

"Q. Yes.

"A. I would say that I would not think that the City would have considered taking on the block the second time unless they could do it in that manner, you see. [105]

"Q. And the contract so provided?

"A. Yes, the contract so provided.

"Q. Now, Mr. O'Neil, I don't think it is material especially, but do you recall when Ohio first took on this second block of power?

"A. I don't remember the day, but I think it was fairly soon after we took it on.



(Deposition of R. D. O'Neil.)

"Mr. Carothers: I think there is no dispute about that.

"The Witness: I think it is in the record.

"Q. If I would say to you that it is in November of 1941, though, would that correspond to approximately your recollection?

"A. Frankly, I can't remember just when it went on, because there were lots of things going on at that time.

"Mr. Metzger: All right, there is no dispute between the parties on that.

"Mr. Carothers: None whatever.

"Q. Now, do you recall that in the spring of 1944 the Ohio Company dropped the second furnace because of some orders of the War Production Board?

"A. I can't say the date exactly, but I remember they requested them to drop the load and, I believe that I can recall what the conditions were.

"(Exhibit "C" was marked for identification.)

"Q. Handing you a document that has been marked Exhibit "C" which is a photostatic copy of a letter to the City of Tacoma, I will ask you if you recall receiving the original of that letter?

"(Witness examines.)

"Mr. Carothers: That is in the record, is it?

"Mr. Metzger: Yes, that is the first letter in the whole story.

(Deposition of R. D. O'Neil.)

"A. The only thing I remember here are these."

Mr. Metzger: And he pointed to something which I don't know.

"Mr. Carothers: Wait a minute. We admit——

"Q. Do you recall receiving that letter? That is, the original?

"A. I was just thinking about where these apparently deleted words are here. I don't remember of that being the copy. It might have been there.

"Q. I don't know what you are referring to about deleting words.

"Mr. Carothers: That is only a quotation.

"The Witness: I know I received a letter of that kind.

"Mr. Carothers: That is a copy of it.

"Mr. Metzger: The letter handed to the witness is a copy of a letter from Ohio, March 21st, 1944.[107] It is a letter to the City of Tacoma, Department of Public Utilities, received by Commissioner O'Neil.

"(Plaintiff's Exhibit "D" was marked for identification.)

"Q. Handing you paper marked Plaintiff's Exhibit "D", which, I believe the City admits is a copy of a letter written by you, do you recall writing that letter?

"A. Yes, I recall this. In fact, I recall that after receiving that request, that Mr. Kent, the Superintendent, and myself, discussed the matter very fully, and, inasmuch as we were buying power in excess of this load, we felt that the——

(Deposition of R. D. O'Neil.)

"Mr. Carothers: Just a moment. You are not answering the question.

"Mr. Metzger: I will ask him the same question.

"Mr. Carothers: All right. Have you the date of that letter?

"Mr. Metzger: Yes, It is March 29th. It shows on the top right under "Tacoma, Washington." It is March 29th, 1944.

"Mr. Carothers: We admit that is a copy of a letter written by the Commissioner to the Company.

"Q. Mr. O'Neil, you say this letter was written after consultation between yourself and Mr. Kent?

"A. Yes.

"Q. Who was Mr. Kent?

"A. Mr. Kent was the superintendent of the Light Department.

"Q. At that time?

"A. At that time, yes.

"Q. And the statements in this letter about the power situation, the Northwest being in somewhat critical condition and the Light Department of the City purchasing power, are correct statements of the conditions then confronting the City?

"A. It was, yes.

"Q. And it was advantageous to the City, therefore, to shut down the second furnace at Ohio?

"A. If I may state why, I guess, yes.

"Q. Go ahead. Was it advantageous?

"A. It was advantageous, yes.

"Q. All right now. Why?

"A. At that time, you understand, the contract

(Deposition of R. D. O'Neil.)

with the Ferro-Alloys Company was for \$17.50 a kilowatt, and to purchase power from Bonneville Power Administration cost us the same rate. Then, the Light Department paid to the general fund of the City an eight per cent gross earnings tax, and also we paid the two per cent tax to the State, which meant that during this period that we would be actually saving ten per cent of the cost that we would [109] have paid otherwise if we had kept on furnishing the power, you see. So, we were agreeable that there be a lapse in the use of that second block for the period asked for, and they would resume operations on thirty days' notice without paying for what they did not use.

"Q. They would not have to pay for it in the interim? A. No.

"Q. It would not be considered an interruption of their contract; it would be outside the contract, the shutdown, is that right?

"A. That would be my interpretation.

"Q. Is that what you intended by that letter?

Mr. Metzger: Apparently there was no answer to that question.

"Mr. Metzger: We have not offered "C". We now offer "C" and "D".

"(Whereupon Plaintiff's Exhibits "C" and "D" were offered in evidence.)

"(Whereupon Plaintiff's Exhibits "E", "F", "G" and "H" were marked for identification)"

(Deposition of R. D. O'Neil.)

"Q. Now, Mr. O'Neil, I hand you papers marked for identification, Plaintiff's Exhibits "E", "F", "G" and "H", which are copies of letters, or telegrams, passing between Ohio and the City, relative to this requested shut-down in April or May of 1944, all of them being [110] admitted by the City as having been exchanged.

"Mr. Carothers: Which we admit.

"Q. Will you look at them. I want to simply ask you if you recall those letters and telegrams as subsequent correspondence passing through your office relative to this shut-down?

"A. I think that—as I say, I can't remember each one of them in detail that far back, but we had a certain amount of correspondence, and I agree that this is a copy of one of the telegrams.

"Q. Well then, look and see if there is a letter of the same date, your reply and a further letter to Ohio.

"(Witness examines).

"Q. That is part of the correspondence?

"A. Yes.

"Q. You recall that Ohio did shut down?

"A. Yes.

"Q. This time?           A. Yes.

"Q. And your understanding of it was that they shut down on the terms of your original proposal that——

"They shut down in accordance with the letter that I had written to them setting forth the conditions, you see.



(Deposition of R. D. O'Neil.)

“Q. According to the conditions stated in your letter of March 29th? [111]           A. Yes.

“Q. Of '44, is that right?

“A. Because we specifically stated that this was not to be construed to break the run of the contract, or anything of that kind. I think you will find in this letter that it was called to their attention it was a mutual agreement between these two parties that they wanted to shut down; it was advantageous to the City for them to shut down, and they would be able to resume on thirty days' notice. In other words, that was tantamount to telling them they could have the 6000 again.

“Q. You say that was mutually advantageous and it would not break the run of the contract?

“A. Yes, that is correct. The letter told them the conditions they could shut down. Of course, if they accepted under those conditions, they could shut down.

“Q. Do you recall whether Ohio resumed the taking of the second block of power while you continued as Commissioner of Public Utilities?

“A. I am not positive, but I think it was after I was out of office.

“Q. I think it was in September—no, it was February of '45.

“A. That was after I was out of office.

“Q. That was after your time?           A. Yes.

“Mr. Metzger: I believe that will be all.

(Deposition of R. D. O'Neil.)

Cross-Examination

“By Mr. Carothers:”

Mr. Rybolt: Do you want to read that?

The Court: No, you can go right ahead.

“Q. Mr. O'Neil, the negotiations leading up to the final draft of the contract, as you stated, consumed some two or three months, did it not?

“A. A considerable amount of time. I can't remember the time of Mr. Jones' first visit until we finally signed the thing.

“Q. Now, during the period of negotiations, there were various terms and conditions discussed, things that they wanted that we could not give them? A. Yes.

“Q. And vice versa? A. Yes.

“Q. And the contract, as finally drafted and accepted, was considerably different than many of the terms discussed during the negotiations, was it not? A. Yes.

“Q. As a matter of fact, all through this negotiation, what the City was attempting to do, or what you were attempting to do, was give Ohio a rate and a contract comparable [113] to what Bonneville would do for them, is that not true?

“A. Well, not exactly in those words. You say in the contract that the City could take care of it, keep the new plant in operation, and furnish us a base load to the new plant and still not be financially——

“Q. But, the \$17.50 rate was a Bonneville rate, was it not?

(Deposition of R. D. O'Neil.)

"A. It was. However, I think you remember that under our contract with Bonneville, they could not serve within the City limits.

"Q. Yes. A. Unless we agreed.

"Q. That they might.

"A. That they might come in.

"Q. That is right.

"A. As I say, at that time, it was contemplated the plant would be built and we felt that that load would be an advantageous base load for our new plant.

"Q. All right. Now, all during these negotiations Mr. Kent was superintendent?

"A. Yes.

"Q. And he took just as active a part in the negotiations as you did.

"A. He did. We talked across the table and sat together on most of the meetings.

"Q. As a matter of fact, the final draft of this contract [114] was made after many consultations between you and Mr. Kent and Mr. Jones?

"A. Yes.

"Q. Our Mr. Jones.

"A. Well, no, I don't know about that. I would not say that he had too much to do in it, but, of course, the final draft was after all of our discussions with the representative of the Ferro-Alloys Company. It was the consensus of thoughts together.

"Q. Including the thoughts of Mr. Kent?

"A. Yes. I don't know about Mr. Jones. I

(Deposition of R. D. O'Neil.)

don't think he did too much in the thing. I think Mr. Kent and I did most of the work on it.

“Q. You are referring to our Mr. Jones?”

“A. Yes.

“Q. Well now, this conversation that you had, or the conversation you had with the representatives of the Ohio people regarding the conditions under which the second block of power would be furnished, took place before the final draft of the contract? A. Oh, yes.

“Q. The contract as executed expressly provides that if the City saw fit to allow the company to come back on with the second block of power after once having dropped it, that the power would be furnished on a firm power basis? [115]

“Mr. Metzger: Object to that question.”

Mr. Rybolt: And then Mr. Carothers withdrew it. Then the next question by Mr. Carothers——

“Q. You have stated that it was your understanding that if the Ohio dropped their second block of power after having taken it on once, that then there would be negotiations as to how it would be taken back on, is that right?

“A. Not necessarily negotiations, but I said the City would have the sole decision as to whether—as to what conditions would exist when they took it on again. In other words, if they did not raise any points, it would go under the terms of the old contract. If they wanted to raise any points, they had a perfect right to.

(Deposition of R. D. O'Neil.)

"Q. Well, is there anything in the contract to that effect?

"A. No, because that was a matter of conditions that might come up at the time that you go to take it on again.

"Q. Yet, that was your understanding before the final draft of the contract, is that right?

"A. That the City would have the sole decision.

"Q. Yes, but you did not put anything like that in the contract?

"A. I think it is mentioned in the contract that we have the sole decision, isn't it?

"Q. The contract provides that it is to be within the discretion of the City as to whether or not they shall go [116] back on.

"A. Maybe I said it in different words.

"Q. All right, but there is nothing in the contract, is there, that says that there would be any negotiations or states an agreement as to the conditions under which the second furnace would operate?

"Mr. Metzger: I will call your attention to the provisions of the contract, Mr. Carothers, which, in that very connection says, 'If and when the City—if and when the Corporation and the City later mutually agrees, that the City will again deliver to the Corporation.'

"Mr. Carothers: I am not raising that question.

"Mr. Metzger: That is exactly the question you are asking about.



(Deposition of R. D. O'Neil.)

“Mr. Carothers: No. If I understand Mr. O'Neil's testimony on direct, it was that if the City saw fit to take them back on, that they could enter into side agreements, or as to the conditions under which the second furnace would operate once back on.

“Mr. Metzger: That is what the contract says.

“Mr. Carothers: No.

“Mr. Metzger: The contract says if they later mutually agree. [117]

“The Witness: At least I thought of the thing, anyhow, whether that was stipulated there or not.

“Q. The word ‘surplus power’ is used in this contract, and was used in your discussion with the representatives of Ohio leading up to the drafting of the contract, is that true?

“A. I don't recollect. I have not read it since we were first negotiating, so I can't repeat the words. It may or may not appear as surplus power in there.

“Q. All right. Now, the contract provides in Section 10, second paragraph of sub-section ‘A,’ that ‘In the event the Corporation elects to exercise its right of alteration, as provided for in this contract, and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City's judgment, surplus power is available in sufficient quantity to meet the Corporation's additional requirements. If and

(Deposition of R. D. O'Neil.)

when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, to be altered downward only by the Corporation, upon at least one (1) month's written notice to the City."

"Now then, it was your understanding that if the City put the Corporation back on with its second block of power, that it would be on a firm power basis?

"A. In other words, we were obligated to serve it.

"Q. Yes, for the duration of the contract if they saw fit to stay on, isn't that true?

"A. Except as under the provisions we have for interrupting certain circumstances.

"Q. Yes. All right. Then, the surplus power that you had in mind was surplus firm power?

"A. Yes.

"Q. That you could furnish twelve months out of the year for the rest of the contract as long as they used it, isn't that true?

"A. As a base load we would have to pass it for.

"Q. Now, in the ordinary use of the words 'surplus power', that isn't surplus power, is it?

"A. Well, that would then be a question whether it is surplus or not. It depends upon your demands. In other words, if we built a plant and we got a sufficient block that might extend over a period, then, we might have surplus power for the full length of time of contract.

(Deposition of R. D. O'Neil.)

“Q. Yes, but that would be surplus firm power, would it not?

“A. Well, it would be power you can supply twenty-four hours [119] a day. It would be firm power you could supply to other people under firm conditions.

“Q. Yes. Well, isn't it a fact that surplus power is power which you have to furnish beyond your firm contract demands?

“A. Strictly speaking, that is surplus power. And, we have dump power.

“Q. What is that?

“A. Surplus dump power is something we supply that we cannot use any place else, and we dump is out. We call it dump power. But, we may have surplus firm power as long as it is not signed up in contractual relations. When it is all signed up in contractual relations, then we have no more firm power.”

Mr. Rybolt: That apparently should be “no more surplus power.”

Mr. Metzger: Either that or no more firm power to sell, I don't care—either one.

“Q. Now you say that it was your understanding that the company was only obligated to operate the second furnace for a twelve months' period. Is that the first and the initial period?

“A. Initial period, yes.

“Q. Section 4, B-3, provides, ‘The additional 6000 kilowatts, if and when used for the second furnace as referred [120] to elsewhere in this contract

(Deposition of R. D. O'Neil.)

shall be at the rate of seventeen and one-half dollars (\$17.50) net per year per kilowatt of billing demand, as in (2) above, except that the continuous and uninterrupted part year operations immediately following a full years' billing at the specified rate, shall be prorated.'

"Now, isn't it your interpretation of that that if the second furnace is operated, that it must be operated for twelve months?

"A. No, for this reason. You say for the first year it was twelve months?

"Q. Yes.

"A. After that time if we put that in they would have to operate a year. We would not obligate ourselves to have to agree to a year at that time when we mutually agreed again, where otherwise we could agree to only furnish them for six months.

"Q. Well now, will you take the contract and point out any provisions that you can make that states, or from which you can gain an inference, that if the City allowed the Company to resume taking of the second block, that they could shut them off?           A. No.

"Q. At any time? Is there such a provision in here?

"A. No, but there is this provision: 'That if the second time [121] we said, 'You can only use it for nine months', that is all they could use it for, would be the nine months.

"Q. Well, find that provision, will you? Do you know of such a provision?

(Deposition of R. D. O'Neil.)

“A. It is the provision you mutually agreed to the condition. That covers it, I believe.

“Q. I wish to withdraw the question and I will ask this question: Will you point out in this contract a provision under which the City will be permitted to discontinue furnishing power for the second block?

“A. I haven't pointed it out.

“Q. In the absence of any special agreement with the Corporation that the City would have a right to discontinue——

“A. No, I haven't. I said there are provisions there for interruption on certain conditions that were covered in the contract, but there is no other provision for discontinuance.

“Q. In other words, if we pulled them back on, we had them, is that right?      A. Absolutely.

“Q. We could not stop?      A. No.

“Q. And on a firm power basis?

“A. Absolutely. No one ever made a statement that we could [122] discontinue, but we could refuse to start the furnace, and——

“Q. Well——

“Mr. Rybolt: Let the witness finish the answer.

“A. (Continuing) We can also take the record according to our mutual agreement. We can put in any stipulation that is mutually agreed by both parties. I think that covers it.

“Q. Well, going back to Section 4, sub-section b-3. This particular section says that in substance again, where we put the second furnace back on,



(Deposition of R. D. O'Neil.)

'That the continuous and uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be prorated.'

"Mr. Metzger: I object to that question as to the form because it purports to state language of the contract, and does so erroneously. It is an improper question.

"Mr. Carothers: Withdraw the question.

"Q. I hand you a contract and ask you to read sub-section b-3."

Mr. Metzger: After reading it, the witness said:

"A. Well, it say exactly what I have tried to tell you here [123] following the full year's operation. They had the full year's operation on it as I understand. Consequently then, any part years would be billed at the part year rate. Now, if this is allowable in the record, we discontinued the operation by mutual consent because it was advantageous to both parties, and I would not consider that interruption, because it was agreed to by both parties. We agreed beforehand, they could come back on with thirty days' notice.

"Q. Well, this does state that——

"Mr. Metzger: We will admit it states what it states.

"Q. Now, your interpretation of that is that if they did not operate the furnace a full year, they would have to pay for a full year's operation nevertheless?

"A. In the first initial year, yes.

"Q. All right. Now, this conversation that you

(Deposition of R. D. O'Neil.)

had on a number of occasions you say with representatives prior to the drafting of this final contract, wherein you say that this twelve months' compulsory period only applied to the initial period, why did you not clarify that point during—in drafting this particular section?

“Mr. Metzger: Object to the form of the question as argumentative and improper.

“Q. (By Mr. Carothers): The contract speaks for itself, isn't [124] that true?

“A. The contract speaks for itself. We drew it up and when it was satisfactory to both parties, the City Council approved it. It was drawn up to the best of my ability at the time it was drawn up.

“Q. Well now, this interruption in the spring of 1944 took place for the reasons and in accordance with the correspondence?           A. Yes.

“Q. As stated, for the reasons and in accordance with the statements contained in the correspondence, is that true?

“A. Well, not altogether, because I think that we disagreed with their contentions in our letter to them, but we agreed that the interruption should take place because of conditions that affected us also.

“Q. Well, that is so stated in the letter?

“A. I say, we stated that in our letter to them, of course.

“Q. Yes.

“A. But, we did not agree to their interpretation of that.

(Deposition of R. D. O'Neil.)

"Q. Well now, your letter of March 29th, I believe it was, stating those conditions, contains no statement that this interruption, or temporary suspension, would not be considered as an interruption of the contract, does it?

"A. It does not state so——" [125]

The Court: How many more pages are there?

Mr. Metzger: If your Honor please, I'm on page thirty-eight, and it includes page forty-four. Seven pages.

The Court: I think we'll hurry along and finish it.

"A. It does not state so, but we said in the letter, if I remember right, we would give them the right to resume the use of current on thirty days' notice, and there was purported to be no consideration to the interruption, so just on ordinary common thinking, I would say——

"Q. Just a moment.

"Mr. Metzger: Let the witness answer the question.

"Mr. Carothers: We don't want common thinking. If there is any understanding to that effect, all right, but I object to that kind of an answer.

"A. There was no understanding to any effect except that that would be my interpretation, that when the agreement was made, that when they resumed operation, it would be just the same as they would run right on through, except they would not pay for that time. It was mutually agreed the Company could drop their load without the City's con-

(Deposition of R. D. O'Neil.)

sent, according to the contract. Then, it would be a cessation of that second block entirely. But, this [126] was mutually agreed to before they dropped the load.

“Q. Well, in accordance with the correspondence?

“A. Yes, and under the terms of the contract.

“Q. Yes. And, there was not any other understanding?      A. No.

“Q. As a matter of fact, there were not any oral conversations about this except perhaps with the local man, is that right?

“A. I think most of it was done by letters, and probably all the discussions that took place about the second block were between Mr. Kent and myself.

“Q. So, you did not have any understanding with the Company other than what is stated in these letters?      A. That is right.

“Q. Your letter stating that there might be a temporary suspension in the spring of 1945 was written after consultation——”

Mr. Rybolt: It should be '44, I believe.

“——was written after consultation with Mr. Kent and Mr. Boyle, in our office, isn't that right?

“A. You mean the temporary suspension in 1944?

“Q. '44, yes.

“A. I believe that we consulted pretty freely with you people on pretty nearly all occasions on these things. I don't remember this particular con-

(Deposition of R. D. O'Neil.)

versation, but I know that [127] with anything that was a matter of legality, or a matter of more heads than one thinking about it, why we consulted with Mr. Boyle and yourself quite often.

“Q. Well, I was particularly interested to know if Mr. Kent was thoroughly familiar with it?

“A. Mr. Kent was thoroughly familiar with it.

“Q. I think he wrote the letter, didn't he? (Mr. Carothers examined the exhibit). You made some reference that your interpretation of the contract requiring them to carry the second block for a period of twelve months, was based on the fact that it was necessary for the City to expend money to serve. A. Yes.

“Q. To prepare to serve them? A. Yes.

“Q. If they were permitted to come back on with the second block after having dropped it, you would be under the necessity of providing the necessary energy to serve the second block as long as they cared to have it?

“A. However, we had reserved the right in the contract to not supply it if we considered it not advisable.

“Q. I say, if you permitted them to come back on?

“A. Well, in normal conditions we would say if we permitted them to come back, it would be an admission on our part that we had the necessary available current for them, [128] therefore, there would be no expense of installation but only energizing the transformers, which would be fusing them, which would be a very nominal expenditure.



(Deposition of R. D. O'Neil.)

“Q. But, in spite of the fact that the contract says that, if you did permit them to come back on, it would be on a firm power basis? A. Yes.

“Q. You would then have a block of 6000 kilowatts tied up that you could not contract away under any firm contract to anybody else?

“A. Yes, but before we would allow them to come back, we would determine those factors before we would say, yes, to come back on again.

“Q. I understand that, but having put them on, you had a firm power commitment?

“A. Yes, the same as the firm power commitment in the first instance.

“Mr. Carothers: I think that is all.”

Mr. Rybolt: Then there is redirect examination by Mr. Metzger.

### Redirect Examination

By Mr. Metzger:

“Q. Now, as a matter of fact, in the writing up of this contract, after your conversations with Mr. Weitzenkorn, [129] and Mr. R. R. Jones representing Ohio, there were no changes from the agreements reached with those representatives of Ohio, were there?

“A. When we made the final proposition which was presented to the Council, there were no changes after that time.

“Q. I mean, there were no changes in drawing that up; you embodied in that contract the agreements you had reached in your negotiations with Mr. Weitzenkorn and Mr. Jones?

(Deposition of R. D. O'Neil.)

"A. The copies of the contract were written up at different times and submitted, and we finally got one that was satisfactory that was presented. That was the concensus of what we had agreed to across the table.

"Q. In other words, the contract that was written up, and signed, embodied the agreement you had reached? A. Yes.

"Q. And Mr. Kent did not find it necessary to make any changes?

"A. Well, all the changes we had made had been in the final submission to those gentlemen.

"Q. They had been agreed to by them in advance?

"A. I don't see how we could have done it any other way.

"Q. That is what I am getting at. Now, as you stated, when you negotiated this contract, and when you entered into it, you were attempting to, by this contract, to establish [130] a base load for the new Nisqually Plant?

"A. That was the discussion we had on that matter, and we felt it would be a good base.

"Q. A good base load for that plant?

"A. Yes.

"Q. And, at that time you figured when that plant came into operation you would have a surplus power over and above the City's firm commitments?

"A. Over and above the normal commitments. This would be a firm commitment also, and it was,

(Deposition of R. D. O'Neil.)

but we would have over and above that amount of power necessary to supply our other obligations, you see.

“Q. That is right. Now, speaking again and just very briefly about this 1944 shut-down, as I understand your statement and the correspondence, Ohio was contending that they had a right to shut down for causes beyond their control and you did not agree to that?           A. No.

“Q. You specified the conditions under which you would agree to a shut-down?

“A. I believe that is so.

“Q. And the shut-down was made under the conditions which you have outlined?

“A. That is right.

“Q. Which was a mutual agreement deemed to be advantageous [131] to both parties?

“A. That neither side should be penalized.

“Q. Neither side should be in any way penalized?           A. Yes.

Mr. Metzger: That is all.”

### Recross-Examination

By Mr. Carothers:

“Q. Mr. Jones and Mr. Weitzenkorn were the first people who approached you about negotiating a contract?

“A. Mr. Jones came first. He came out first and talked about it. Then, I believe he made a second trip. I think about the third trip Mr. Weit-

(Deposition of R. D. O'Neil.)

zenkorn was with him. I am trying to think back. I know Mr. Jones came out here first and we talked over this situation.

“Q. But you don't recall when the conversation took place wherein you discussed the conditions surrounding the operation of this second furnace?

“A. I think that was a part of the discussion from—I don't think Mr. Jones mentioned that, but after we got into drawing up the contract, I think it came up. I don't recall exactly how, but I believe that they contemplated the second furnace right from the start of our final negotiations on the contract. I know this much, that Mr. Jones sent a letter back, and I think you sent a [132] letter back, and in your letter it was many blocks of 6000, and I said one block. I think you will find that back in the correspondence.

“Mr. Carothers: I think that is all.”

(Witness excused.)

Mr. Metzger: Now, if your Honor please, we offer identification A to H attached to the deposition.

The Court: They'll be submitted. Do they—I think they had better be taken off of the—and marked with appropriate numbers here that conform with marking such property.

Do these exhibits include the correspondence between the parties?

Mr. Metzger: Yes. Exhibit A is a copy of the contract. This is Exhibit A.

The Court: Oh, well, that—we have it—I mean when this suspension now——

Mr. Metzger: Yes. Exhibit B is a letter from Mr. O'Neil to Mr. Weitzenkorn in October of 1941, interpreting the contract in evidence on various points but particularly regarding this twelve months payment.

And, Exhibits C to H are correspondence of witnesses of the suspension in '44. The request for [133] suspension because of the War Production Board's orders, Mr. O'Neil's reply stating that they didn't agree to that, and laying down conditions under which they would talk.

Mr. Carothers: The charges are that those last four, the contract—but the others it is the defendant's desire that they be made as exhibits.

The Court: How many more witnesses do you have, Mr. Metzger?

Mr. Metzger: I have one—two—three.

The Court: How many witnesses will you have, Mr. Carothers?

Mr. Carothers: I'll have about four or five, I think.

The Court: It's very evident, of course, we can't finish this case today. Tomorrow morning the jury is reporting in here to try a short criminal case and I feel that I shall have to suspend this case for the purpose of disposing of that jury case. My calendar is very full for next week.

Will you—may I see the Clerk's docket. I didn't bring mine.



Mr. Metzger, you have here a case on Tuesday.

Mr. Metzger: Yes, your Honor. Now from my point of view, that adds confusion to the confusion [134] already existing. That's merely an argument. It was specially set and counsel is coming from San Francisco. They called me yesterday and they plan to arrive here Sunday for discussions with me. Well, I can't go on with this case and discuss the other case with other counsel.

The Court: Well, I—I—you'll be able to get in touch with them to stop them. I shall vacate the setting of it on my own motion. The Clerk will be directed to notify attorneys for the plaintiff, because I can't possibly hear it, from the state of my calendar at this time, and it can either be re-set on application or the Court can re-set it. It will have to be set sometime in May.

Mr. Metzger: That would be—I know that plaintiff's attorneys in that case will be disappointed to say the least, if it has to go over that far. You're speaking now, I take it, of the Longview Fibre Company matter which was set for Tuesday, next?

The Court: P. U. D. versus——

Mr. Metzger: Yes. Longview Fibre.

The Court: Longview Fibre Company.

Mr. Metzger: Yes.

The Court: Well, P. U. D. is the plaintiff.

Mr. Metzger: Yes.

The Court: I think I shall have to re-set [135] that to—to take its place on the regular law calendar and the parties could argue it then.

Mr. Metzger: Well, we both request additional time to argue it, your Honor. Counsel expects to come from San Francisco to participate in the argument.

The Court: Due to that fact I shall vacate this setting and re-set it for the 20th of May. And this case—I don't think I'll work on it any further today because we didn't have any intermission, but continuously worked for two hours and fifteen minutes. I think it will have to go over until Tuesday, but I'd want it to be finished, if it possibly could, on that day. You ought to complete it——

Mr. Metzger: I think, your Honor, we can.

Mr. Carothers: Well, the docket is clear for us Tuesday morning, is that correct?

The Court: There is a habeas corpus case, but it shouldn't take a great while. It may be 10:30 before we can take this matter up, Tuesday.

Mr. Metzger: Well, it's recessed until ten o'clock with the provision that we may be a little while after that getting on, is that my understanding?

The Court: Yes, I think we'll continue until say 10:15 on Tuesday morning.

Mr. Carothers: Just before the Court recesses [136] the witness for the plaintiff testified regarding the fact that he's—was familiar with this recording record that was made on—the record needed at the plant. We think that it's only fair and we ask the Court to require the plaintiff to make avail-

able that chart for inspection by the representatives of the City between now and Tuesday. He's testified that he's——

The Court: Oh, I think that should be done. I don't know whether there's any objection—not the whole chart over all this period of years, but just for the months that are involved.

Mr. Carothers: From September to February 26th—September——

The Court: Yes.

Mr. Carothers: February 26th.

Mr. Rybolt: I believe, your Honor, that the witness said that that was in Canton. Now, we'll do our best to get it here by that time, but I'm——

The Court: Well, I understood him to say that it was here.

Mr. Metzger: Well, now it develops that—upon inquiry now, I think it is in Canton. We'll try to get it here just as fast as we can.

The Court: Well, I don't think—I don't want to take the time to have it brought in here, but [137] some City—some—one of the City officials may examine it for the sole purpose of ascertaining if you went over the 6500 during these months involved. I assume that's the one.

The Court will be at recess until ten o'clock tomorrow morning.

(Whereupon adjournment was taken on this case until 10:15 a.m., April 29.) [138]

April 29, 1947—10:15 A.M.

The Court met pursuant to adjournment; all parties present.

WILLIAM PRITZ

resumed the stand for further examination, and testified as follows:

Direct Examination

By Mr. Metzger:

Q. Mr. Pritz, to pick up—I think you testified, but in any event, what is the fact. Following November 24, 1945, did you do anything about setting the company's demand limiter?

A. Well, after the 24th of November, why I proceeded to have our demand limiter adjusted for the operation of one furnace. That would be to operate on the original block——

Mr. Metzger: A little bit louder, please.

A. ——That would be to operate on the original block of 6500 kws.

The Court: That was what date, Mr.——

The Witness: That would be after November 24th.

Q. How soon after that? [139]

A. Well, at midnight.

Q. At midnight on what date?

A. Starting the 25th.

Q. Starting the 25th. That demand limiter remained set at that point since that time. Now following—going right along in that—with the demand limiter set that way, and if it was in work-

(Testimony of William Pritz.)

ing order, what was the fact as to whether or not your operations could impose a demand in excess of 6500 kilowatts?

A. I didn't get that question.

Q. I say, assuming your demand limiter is in good working order and operating and set—that you set it at midnight on December 24, 1945. Could the plant operations impose a demand in excess of 6500 kilowatts? A. No, it could not.

Q. It could not. Now, Mr. Pritz, after November 24th, or—strike that. What was your practice—what did you do about—if anything, about inspecting or comparing the readings of the company's demand meters and the City's demand meter?

A. Well, it was my practice daily, and several times during the interim of the day to look at the City demand meter and also check ours, but, of course, I was probably interested in the reading of the City's demand meter because that was the billing demand. [140]

Q. That's right. Now, when, following November 24th, did you discover anything seemingly out of the way in connection with the City's demand meter?

A. Well, I found nothing wrong until the 31st of December.

Q. What did you discover that day?

A. I found that on inspection—I arrived at the plant at 7:30 in the morning, and it was the custom as I'd pass on to the furnaces, I'd pass through



(Testimony of William Pritz.)

the building where the demand meter was stationed—was located, and upon observing the meter I noticed that a demand of 7500 had been attained.

Q. What did you do about it?

A. Well, I contacted the City and asked that they send some of their qualified men down to inspect the meter.

Q. Who did you talk to, if you recall?

A. I believe I talked to—on the 31st I believe I talked to either Mr. Thomas or Mr. Jones. I am not quite certain.

Q. Mr. Jones is a man in the court room here now?

A. Yes, sir.

Q. Sitting on the right side of the court room as you are facing. What did you say about the situation?

A. Well, I told Mr. Jones that I felt something was in error with their meter, that I was on a one-furnace operation and felt that I wouldn't be pulling a load [141] that would indicate a 7500 demand, so during the day after our conversation, the City Meter Department sent their representatives down to check their meter.

Q. Well, now before we get down to the representatives, did Mr. Jones say anything in response to your statement to the effect that the plant's operation was a one-furnace operation, and you couldn't therefore have a demand in excess of 6500?

Mr. Carothers: Just a minute, we object to that.

Q. Well, all right. In response to your state-

(Testimony of William Pritz.)

ment that you were on a one-furnace operation, did Mr. Jones say anything about—reply to that?

A. He merely stated that we were paying for 12,500 and he didn't seem concerned that the demand was at 7500, and he felt that I should not be too worried about it.

Q. Did he—to refresh your recollection, did he or did he not say anything to the effect that the City knew that you were on a one-furnace operation, but it didn't make any difference because, we're going to be billed for a demand of 12,500 anyway?

Mr. Carothers: I object to the question.

The Court: The question is quite leading, but I think I'll let him answer the question.

A. To the best of my knowledge, he merely stated that I was [142] paying for 12,500.

Q. I see. All right. Now, in response to your telephone conversation with him, did any representatives from the City come down?

A. On the 31st of December Mr. Avril and Mr. Parker, City meter men, came down to inspect their meter—test it.

Q. Did you see them and talk to them?

A. Yes, I did.

Q. Did you have any conversation with them concerning the character or magnitude of the company's operations?

A. Well, I merely stated that I was on a one-furnace operation and didn't believe that I could pull a 7500 load demand.

(Testimony of William Pritz.)

Q. Now, Mr. Pritz, following that day, did any similar event or events take place shortly thereafter?

A. Well, on the—New Year's Day, the first of January, why the demand again went up.

Q. What time of the day?

A. Well, I ascertained it went up between the hours of 4:30 p.m. and 7:30 p.m. on New Year's Day.

Q. How do you fix that time?

A. Well, at 4:30 p.m. I checked the City demand meter before I left the plant; went home and had my evening meal and as customary came down to the plant in the evening. I got [143] there around 7:30 and passed through the building again. When I checked the meter I noticed the demand was at 7500 again.

Q. What was—were you on a one-furnace operation at that time?

A. I was on a one-furnace operation.

Q. And you had been since the 24th of November, is that correct?      A. Yes.

Q. What did you do about this City meter's reading at that time, on the 1st of January?

A. Well, I contacted the City on the 2nd or the 3rd of January, and they sent their meter men down again to check their meter.

Q. Do you recall who you talked to at the City at that time?

A. Off hand I don't know who I talked to. Either talked to—the only two fellows I've ever talked to

(Testimony of William Pritz.)

is Mr. Thomas or Mr. Jones. It would have to be either one or the other.

Q. Who is Mr. Thomas?

A. Well, he's one of the foremen. I believe, on the line—tower lines. He handles these sub-stations.

Mr. Metzger: For the record will it be admitted that Mr. Thomas is in charge of the City's Tide-flat Substation—is that the right answer? [144]

A. Well, that's who I usually call when we're in trouble, when we want to know anything. I know him better than the other men in the City line—

Q. I see. What did you say at that time?

A. Well, I just told him that the—their meter registered a demand exceeding 6500.

Q. Did you repeat any statement to the effect—relating to the magnitude of the company's operations?

A. Well, I merely stated that their meter registered a 7500 demand and that I questioned it, and asked that they send a——

Q. Did you tell them why you questioned it?

A. My own personal belief was that I didn't think I was capable of pulling that much.

Q. I see, but did you communicate that to Mr. Thomas, or whoever you talked to? I know what your belief is, but——

The Court: Evidently the witness hasn't a very clear recollection of the matter.

Mr. Metzger: All right. That's all.

(Testimony of William Pritz.)

Cross-Examination

By Mr. Carothers:

Q. Mr. Pritz, you perhaps testified on—last Thursday, but I do not recall, how long had this demand limiter device [145] been in operation?

A. Our demand limiter?

Q. Yes.

A. Well, it had been in operation ever since we went on the demand back in '42, I believe. Whenever it was necessary that we attain a demand limit, that's when the limiter was in use.

Q. Is the same demand limiter there now that was put on in '42?           A. Yes, sir.

Q. Your initials are W. W. Pritz?

A. That's right.

Q. You were superintendent of the plant on the 8th day of July, 1944, were you not? Do you recall on that date writing a letter to the City of Tacoma, Department of Public Utilities, in which you discussed the trouble you were having with the demand limiter and in which letter you stated: "We wish to advise also that we are planning to purchase immediately a more suitable demand limiting device and will in the future endeavor to manually watch our input rather than depend solely on the demand limiter?           A. Yes, sir; I wrote that.

Q. And you never—you never changed—you never got a new demand limiter, did you?

A. Yes, sir, we got a Westinghouse demand limiter which is [146] in use at the present time.



(Testimony of William Pritz.)

Q. Well, I thought you just testified that you had the same one that you put on in '42?

A. Well, at that time—at the time that you're talking about, that GM 11 was in action. At the present time it is not.

Q. As a matter of fact, you had trouble with a lot of your equipment over there, with meters and demand limiter and your chart meter. All of them. You were continually calling the City about it, were you not?

A. I called the City at times to verify and check.

Q. You had the City work on them from time to time, did you not?

A. They worked on the furnace totalizing meters. At any time, I don't believe they took the demand limiting devices out of the plant to work on them. I've had them come up and check with me against the City demand meter to see that they're running right, and synchronization.

Q. Mr. Pritz, you know, as a matter of fact, the outcome to all these visits that our meter men had, and the inspectors made over to your plant, they never found the City's meter out of proper operation. When the meter was tested—when it was taken out it was—they reported to you it was correct, did they not? [147]

A. That's correct.

Q. When was the Westinghouse demand limiter installed, if you know?

A. In its original form, or its original installation, it was installed as merely a recording device

(Testimony of William Pritz.)

—a graph chart, as it were. After this controversy, I believe in March of '46, it was hooked up so that it became a—a demand limiter in effect the same as the original demand limiter that we had, GM 11.

Q. Then this General Electric demand meter that you refer to in your July 8th, 1944, letter was in operation until March, '46, is that right?

A. It was in operation at the time this—this question that we're talking about.

Q. Now this—this particular chart meter is right out in the open exposed to dust. It wasn't enclosed in a glass case or protected, was it?

A. Which meter are you referring to?

Q. I'm speaking of the one that—the meter that—the recording meter?

A. The Westinghouse, you mean?

Q. Yes.

A. Well, it's in our substation and it's enclosed in a glass case. I guess it's as clean as possibly meters of that type can be kept clean. [148]

Q. So you are assuming that because our meter showed a demand beyond 6500 it was wrong. Is that your only reason for assuming it was wrong?

A. I make the statement that we wouldn't be able to pull 7500 demand. I don't know whether the meter—your meter was wrong or was correct.

Q. Well, as a matter of fact, you know that you can exceed the 6500 by a considerable number of kilowatts on one furnace, can you not?

(Testimony of William Pritz.)

A. Yes, you could exceed it a few kws., but I—I dare—I feel that you couldn't pull 7500 without injuring your transformer to the extent that it would possibly blow up or short out.

Q. Well, you had sufficient transformer capacity there for 12,500, did you not?

A. The City had that, but one transformer such as we have is incapable of pulling 12,500.

Q. What is the capacity of your transformer?

A. Our transformers are 6000 kva.

Q. Well, as a matter of fact, you know that that could be exceeded by 25 or 30 or 40 per cent, do you not?

A. I do know that, but if you were pulling 7500 kw. your kva. would be way overrated.

Mr. Carothers: I think that's all.

The Court: What do you mean by this demand [149] limiter? That you could just take that much energy into your plant and then it would—the energy would cease to flow if you went above that?

A. The energy would be cut off from going into the furnace transformer. We operate on a one-half hour demand period.

The Court: Well, when you set this device at 6500 kws., how would it get to 7500?

A. The only way that it could exceed the setting at which we had it set would be for the furnace to pull a load of power exceeding that.

The Court: Well, but I thought that limit—it would just automatically shut off the furnace.

(Testimony of William Pritz.)

A. The limiter if functioning correctly should shut the furnace off and it was our endeavor at all times through our own men and men with professional services——

The Court: Well, I'm not so much concerned now with your endeavor, I just want to find out something about how this apparatus worked. It could be set at 6500, but then it might automatically go on to a higher figure?

A. If it wasn't functioning it would let the power go on, yes, sir.

The Court: And it did actually go on as far as you know. In January it was showing 7500? [150]  
1—OHIO (folo Metheny) 10/18 hochwalt

A. The City demand meter registered 7500. Our limiter would not show—it merely kicked the furnace off, it had no chart or any way——

The Court: Well, did you have any experience of having the furnace kicked off in December or January?

A. Yes, the furnace would be kicked off several times during the day if we came up to the 6500. We had the limiter set at 6384 and when the demand—the average demand for that period would come up to 6384, the furnace should be kicked off as that's where the setting was set for.

The Court: But at no time you say after November the 24th did you have the second furnace on?

A. No sir, we were on one-furnace operation.

The Court: Have you had it on since?

A. We have——

(Testimony of William Pritz.)

The Court: You are still operating on the one furnace basis.

A. One furnace operation.

The Court: And if you consumed more than 6500 kw's in January or December, it was because the one unit was using it?

A. If that were the case it would be that one—one would have done it, yes sir.

The Court: Well then you were to pay for that excess on—a rate independent of the second furnace? [151]

A. I believe that's correct.

The Court: That question perhaps isn't a question that's appropriate to you.

That's all.

Mr. Carothers: Mr. Pritz.

The Witness: Yes sir.

### Cross-Examination

By Mr. Carothers:

Q. Section three (b) of the contract with Ohio provided that: "The City shall install sufficient capacity in its transformers, switches and lines, so that power inputs of 7500 kilowatts may be taken by the Corporation without injury to the City's facilities." Now that refers to the initial delivery of one furnace.

Mr. Metzger: Just a minute, if Your Honor please, I don't think this is proper cross-examination. This witness—hasn't—



(Testimony of William Pritz.)

The Court: It might have been provoked by the question the Court asked, but I don't know whether this witness is——

Mr. Metzger: He hasn't professed to testify as to the contract terms.

Mr. Carothers: I withdraw the question. That's all. [152]

The Court: That's all, Mr. Pritz.

Mr. Metzger: Well, just one more question if Your Honor, please.

Redirect Examination

By Mr. Metzger:

Q. Now, Mr. Pritz, in view of the first question, I show you a sheet of paper that's marked for identification Plaintiff's Exhibit 3. I think you identified that as the section of the chart made by the Westinghouse Recording Demand meter covering a period from——sometime early in the morning of December 31st to the end of January 1st or perhaps into January 2nd. Is that correct?

A. Yes sir.

Q. That covers then the period when you observed the City's recording—or City's demand meter to register a demand in excess of 6500?

A. Yes.

Q. This graph records the demand from the same side of the transformers as the City's demand meter? A. Yes.

Q. Does it show any demand in excess of 6500 during that period? A. No sir, it doesn't.

(Testimony of William Pritz.)

Q. Does it show any indication that it was not recording demands during all of that period, every half hour?

A. It was recording demands all except the time that the furnace would be down then it ceased to record.

Q. All the time the furnace was in operation, it was recording demands? A. Yes sir.

Mr. Metzger: We now offer this chart in evidence.

Mr. Carothers: No objection.

The Court: It will be admitted.

(Whereupon the chart referred to above was admitted in evidence as Plaintiff's Exhibit 3.)

Mr. Metzger: That's all, Mr. Pritz.

Mr. Carothers: Just one question on this chart.

#### Recross-Examination

By Mr. Carothers:

Q. That is a section torn out of a roll 25 to 30 or 40 feet long, is it not—the section of the chart?

A. Yes sir.

Q. Just covered two days. One day and—two or three days? A. Three days.

Mr. Carothers: That's all. [154]

(Witness excused.)

Mr. Metzger: Call Mr. Farmer.

MARVIN FARMER

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, please?

A. Marvin Farmer.

Q. Beg pardon, I didn't get it?

A. Marvin Farmer.

Q. Marvin Farmer? A. Yes sir.

Q. Where do you live, Mr. Farmer?

A. In Philomath, Oregon.

Q. Were you at any time employed by Ohio Ferro-Alloys Corporation in Tacoma?

A. Yes sir, I was employed in '41 and worked until the early part of '43. I was a maintenance man and later maintenance superintendent. Then, on return from the service I was employed by them again starting on the 19th [155] of December 1945.

Q. 19th of December, 1947?

A. At which time I was in Canton, and reported out here, the first day at the plant was the 27th.

Q. 27th day of December, 1945?

A. Yes sir.

Q. In general, what were your duties? Did you have anything—in other words, did you have anything to do with the meters—electrical meters affecting the current, the taking of current—taking of energy, from the City?

(Testimony of Marvin Farmer.)

A. Well, at the time I returned, I was trained to fill in as Plant Superintendent and at that time we had a new maintenance man and it was my duties to—that is a maintenance superintendent, and it was my duties to assist him and line him out on his duties, in which case I had a great deal to do with.

Q. Well, going to the 27th of December—from then on, did you have occasion, or was it in line of your duty and did you examine, daily or periodically, the readings of the various meters that were installed at the plant?

A. Yes, as Mr. Pritz laid out to me, that was one very important duty and I carried it out to the best of my ability of checking several times a day on each one of the meters.

Q. Well, on December thirty—27th, 1941—forty—excuse me— [156] four o'clock, I beg your pardon, what maximum demand was registered on the City's meter?

A. Well, as near as I could figure, it was about 6350.

Q. 6350?

A. And, at that time, why Mr. Fudge and I figured it together.

Q. Who is Mr. Fudge?

A. Mr. Fudge is G. E.—General Electric Service Engineer.

Q. Service engineer?                      A. Yes sir.

Q. From the General Electric Company?

A. Yes sir.

(Testimony of Marvin Farmer.)

Q. What was he doing in the plant?

A. Well, it seemed that Mr. Pritz called him down to make a general check on our recording meter as to synchronism with the power company's meter.

Q. I see. On the—January twenty—or December 27th, 1945, the City's meter recorded 6300, did you say, or——

A. As near as we could figure, it was about 6350.

Q. 6350. Now that meter in its operation, Mr. Farmer, records the highest demand that's been previously imposed, does it not? Since it was last reset?

A. Once a month they would reset that meter.

Q. Yes.

A. Then there was a needle on that meter that would stay [157] fixed.

Q. In other words if they set it on the first of the month or the last day of the month, the next day there was a maximum demand of—of, we'll say 6000 kilowatts, the indicating needle would go up to 6000 kilowatts. Is that correct?

A. That's correct. Any half hour period would place it.

Q. Well then if the next day there was no demand that high, the needle would still stay at 6000?

A. That's correct.

Q. And if the following day there was a little higher demand of 6100, the needle would—the indicating needle would move up to 6100?

A. That's correct.



(Testimony of Marvin Farmer.)

Q. So that—that meter never showed when the demand reached that high point?

A. No, that meter could not record any date, at all.

Q. Just simply said that sometime since it was last re-set, the demand got up this high?

A. That's correct.

Q. Well on December 27th, the City's demand meter was at 6350. That meant that no demand more than that had been imposed, according to that meter during the month of December to that date. Is that correct?

A. That's correct because Mr. Fudge was assisting me in [158] getting familiar with the—Mr. Crites was assisting me in getting familiar with the meters again. It had been several years——

Q. Well, I'm just asking you about the—that's a fact as to this meter? A. Yes.

Q. Did you compare that with the record made by the company's recording—Westinghouse Demand Meter?

A. Yes, it was—the company's meter was right above it and it was just a glance up there, and it was——

Q. Two were on the same panel?

A. Yes, right adjacent.

Q. You could look at one and at the other without moving from where you were standing. Is that right? A. Yes.

Q. And the—what was the practice compared

(Testimony of Marvin Farmer.)

with—between the City's meter and the company meter at that time?

A. You mean in the——

Q. Did they show the same demand? Approximately?

A. Well, they were very close, as best we could tell. That needle on the power company's meter was so fine that it's hard to make an accurate check on it, but——

Q. When you say the power company, you mean the City, is that right?      A. Yes sir.

Q. Now, following December 27th, when did you notice anything that seemed to you out of the way with either of them, if anything?

A. Well, the morning of the 31st, the meter was—the City meter was way above 6500—indicating way above 6500.

Q. Was there any corresponding increase in demand registered on the company's meter?

A. No sir.

Q. Mr. Pritz has testified that he called the City and the City representatives came down to the plant on the 31st day of December, 1945.

A. Mr. Avril was in the plant on the 31st, yes.

Q. Did you see him or talk to him?      A. Yes.

Q. Did you say anything to him regarding this—demand that the City's meter appear to have registered?

A. Well yes, it—with me it was an elimination of error. I wanted to get it straightened out, and I explained to him the situation of one-furnace oper-

(Testimony of Marvin Farmer.)

ation, and the fact that our meter seemed to be—our demand limiter seemed to be working correctly at that time, and that it would be next to impossible to draw that load on one furnace.

Q. Now, as I understand you, you told him that the plant was on one-furnace operation and that it would be, as you say, next to impossible to draw a load the City meter [160] registered?

A. Yes sir.

Q. Did a similar occurrence happen the next day or a day or two thereafter?

A. Well on the 31st it happened.

Q. We've been talking about the 31st, 31st of December.

A. It never happened after the 31st, no.

Q. What about the 1st of January?

A. Now, wait a minute. I recall that statement. It never happened after the 31st with the exception of the first of January that we know about. The first of January it did happen. I get my dates mixed up.

Q. What time did it happen on the first of January?

A. It happened in the evening of the first, between four thirty and—as far as I know, seven thirty. I arrived at the plant at eight and Mr. Pritz called my attention to it.

Q. You observed yourself the City's meter was then registering a demand in excess of 6500?

A. Yes sir.

(Testimony of Marvin Farmer.)

Q. Did you check again the City's recording meter at that time—the company's recording meter?

A. Yes.

Q. Did it show any excessive demand?

A. Well no, it didn't show any excessive demand over 6500. [161]

Q. Did the City's man come down there after—about it?

A. Well, Mr. Pritz, I believe, called them up on the following day and they come down the day following that.

Q. Who came down that time?

A. Mr. Avril, I believe, and there was somebody with him. I believe it was a Mr. Parker.

Q. I see. Now, when they—did you have any conversation with those gentlemen, when they were down there on the 2nd or 3rd of January?

A. Yes sir.

Q. '46. I take it, Mr. Farmer, you were more interested in tracing where the error was, if there was an error..      A. That's true.

Q. Did you have much the same conversation with these people on that occasion as on previous occasions?

A. Yes, the same situation exists, therefore the same conversation existed. It was much the same thing.

Q. In other words, as I understand you, you were saying, "We're on one furnace operation and we can't go on over 6500. Now how did this happen?" Is that right?

A. That is the——

(Testimony of Marvin Farmer.)

Q. That's the gist of it?

A. That is the general——

Q. Topic or trend of the conversation? Is that right?

A. Yes sir. [162]

Mr. Metzger: That's all.

The Court: Well, what I'm interested in is did you find anything that was wrong. Not so much what you said. Whose meter was off. Was that discovered to your knowledge? And if you don't know, just say you don't know.

The Witness: That wasn't discovered.

### Cross Examination

By Mr. Carothers:

Q. Mr. Pritz—or, I mean, Mr. Farmer, the fact remains that any time that the City man came down, that is to various factors, meter readings, and so forth, that they found that the City's meter was correct in all these tests. Isn't that true?

A. They said that it was correct at that time, yes sir.

Q. You found that on the early morning of December 31, 1945, that the City's meter had gone up beyond 6500?

A. Yes sir.

Q. What time was that?

A. Well, I believe I arrived there about,—between seven and seven fifteen and that is the general time I first made the rounds through the plant.

Q. Well, but that meter, any time between the 27th of December which was the first day you were there, and the early morning of the 31st of Decem-



(Testimony of Marvin Farmer.)

ber, could have [163] registered that demand in excess of 6500. Is that not true?

A. That would have been true had I not been looking.

Q. Well,—

A. But I watched it very closely.

Q. Well, but it might have registered that on the night of the 30th of December, might it not?

A. Sometime during the night, after the time I left, it could have, yes.

Q. And, you didn't—your recording meter chart is rolled up in rolls as it passes the recording instrument, isn't it?

A. The company's—that's what all those company meters does, yes.

Q. Yes. So that you couldn't inspect your recording meter to find out when that went up beyond 6500, could you?

A. It's a very simple matter to remove that roll and roll it out. I did that quite extensively.

Q. Well, how can you explain the fact that this particular piece of this chart is torn off at six o'clock in the morning and on the 3rd or 2nd of December. Where's the rest of that chart?

A. I believe that it's at the plant. I have good contact with the company, but I wouldn't know where it was.

Q. You don't know?           A. No sir.

Q. You don't know why that isn't here?

A. No sir.

(Testimony of Marvin Farmer.)

Q. Now you said that this demand in excess of 6500 didn't occur again after the 3rd of January 1946. Is that right? A. That is not right.

Q. When did it occur again?

A. According to your meter——

Q. Yes.

A. ——you cannot tell if it increased to a point —just so it didn't increase to a point above the reading that it was set there. There would be no way to record it. You'd have to stand on watch at each half hour period to make a statement like that.

Q. As a matter of fact on the 3rd of January, 1946, when our City men checked your meter and our meter, they found a discrepancy, did they not, in the readings of the two meters?

A. It might have been a slight one, but it was not a discrepancy of noteworthy value. I believe that they were a few fractions off, but they weren't beyond the normal error of meters.

Q. They set the meter back to what position on the 3rd of January? [165]

A. The same position that it was in when they come to work on it.

Q. That was what?

A. Just slightly above 65, I believe. I know it was in the neighborhood—excuse me, seventy-five. I know it was in the neighborhood of seventy-five.

Q. All the local people were quite concerned about the fact that you were exceeding your 6500 demand over there, according to the City's meter, were you not?

(Testimony of Marvin Farmer.)

A. Very definitely we were concerned. That's what we're billed on—I mean that's what the company is billed on.

Q. And you knew that you were supposed to keep that below the 6500, didn't you?

A. That is correct.

Q. Yes, and the home office was after you about wanting to see that you keep it down?

A. That is correct.

Q. Yes.

Mr. Carothers: That's all.

#### Redirect Examination

By Mr. Metzger:

Q. You did keep it down, did you not?

A. That is correct.

Mr. Metzger: That's all, Mr. Farmer. [166]

(Witness excused.)

Mr. Metzger: Call Mr. Jones.

---

#### ROBERT R. JONES

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Metzger:

Q. What is your name, sir?

A. Robert R. Jones.

(Testimony of Robert R. Jones.)

Q. And where do you live?

A. Akron, Ohio.

Q. Do you have a profession?

A. I am a consulting engineer—professional engineer in the State of Ohio.

Q. In what branch of engineering, if any, do you specialize?

A. My professional card is electrical, mechanical and metallurgical.

Q. Are you at present employed by Ohio Ferro-Alloys Corporation?

A. Under a retainer. I'm not on their payroll.

Q. As a consulting engineer? [167]

A. As a consulting engineer.

Q. Did you have any connection or problems with—by Ohio Ferro-Alloys Corporation in 1940?

A. Yes, sir.

Q. What was the nature of that?

A. I was employed to make a trip to the Pacific Northwest to investigate sites and power conditions and to determine a location for a western plant.

Q. Did you approach the City of Tacoma?

A. I did.

Q. Whom did you contact?

A. Mr. R. D. O'Neil.

Q. He was then Commissioner of Public Utilities? A. Yes sir.

Q. And, with what result—what was the result of your contact with him?

A. I took back with me a proposal—a proposed contract offered me by Mr. O'Neil for a block of

(Testimony of Robert R. Jones.)

power, or a quantity of power sufficient for the plant that we then had in mind building.

Q. Was that for a one single furnace operation or a multiple furnace operation?

A. No, it was for a single furnace operation primarily with a paragraph in there, or a consideration for a second furnace which was not then authorized, but a second furnace [168] was provided for in this original proposal that Mr. O'Neil gave me.

Q. Following that proposal, briefly, did you have any further connection or negotiation of contract that was ultimately entered into?

A. I came back in late January '41.

Q. Did anyone accompany you?

A. Mr. Weitzenkorn.

Q. Who is he?

A. He was the executive Vice President of the company.

Q. When you got here, whom did you contact or deal with?      A. Mr. R. D. O'Neil.

Q. Mr. R. D. O'Neil. I take it, you were still endeavoring to get a contract that would be acceptable for the furnishing of electrical energy, is that correct?      A. That's correct.

Q. Well, at the time of that meeting what were the principal points of difference or disagreement between——      A. Well——

Q. Ohio Ferro on one side and the City on the other?

A. There were three or four major points. One



(Testimony of Robert R. Jones.)

of them was starting rate. The reason for certain amount of experimental work which we'd have to do in a new industry and a new location with new raw materials.

Q. All right. [169]

A. The second was the question of power factors.

Q. Yes.

A. The third was the escrow rate—escrow clause.

Q. The escrow clause.

A. And the fourth was a discussion on the second furnace—second block—the taking of the second block.

Q. I see. Well, in this lawsuit we're concerned only with the second block, so—now, getting down to the second block, what matters of difference—points of difference were there that developed when you commenced your negotiations at that time?

A. As I remember it, the City's proposal provided for but one taking and a then permanent suspension. The—we knew that there would probably be more than one taking, business affairs being as they usually are, so we had to provide for more than one taking of the furnace. In other words, the first taking and then a shutting down, and then if business conditions developed—bettered, a second taking and so on until the lapse of contract.

Q. Now, you're talking about—specifically about the block of power or load for the—for the second furnace operation.

A. Yes.

Q. Is that correct? [170]

A. Yes, sir.

(Testimony of Robert R. Jones.)

Q. All right. One question before I go on with that,—what time was it that you were here with Mr. Weitzenkorn?

A. It was the latter part of January of '41.

Q. Latter part of January. Well now in addition to this question of provisions for suspension and resumption of taking of the power for the second furnace, what other matters of difference or—

A. Well, these other matters that I mentioned before——

Q. I'm talking only about the second furnace.

A. Oh, about the second furnace?

Q. Just the second furnace.

A. Well, the discussion turned somewhat on the first taking and first session of that furnace. As I recall it, the City had made a proposal that after the running of the second furnace for a time; in other words, the first taking which was in that case the only taking, then we—we would be required to buy from the City a separate set of power to serve that second furnace. Our counter-proposal which I wrote and sent Mr. O'Neil prior to my visit here provided that we pay the interest on that equipment only during the time that we did not use the second block.

It is my recollection now that Mr. O'Neil [171] said that that was—neither one of those things could be done legally by the City. He didn't explain why or what but the statement was made and I heard it. Therefore, he proposed an alternate which is incorporated in the contract.

(Testimony of Robert R. Jones.)

Q. He proposed what? A. An alternate.

Q. I see. I misunderstood you.

A. Which is the alternate in the contract.

Q. What was that?

A. That we pay for this second furnace—second block at the time of the first taking for twelve months, whether we used it or not. The minute we engaged—took on this block we were required to pay for it for a year. The reason for that was that this year's use would give sufficient revenue to the City to pay for the labor they would be put to to install equipment for the use of the second block.

Q. I see.

A. That was the first taking, the first year and then that only.

Q. All right. You said, that was the condition that was laid down by Mr. O'Neil?

A. Mr. O'Neil's condition.

Q. And that was the final action of you and Mr. Weitzenkorn [172] with respect thereto, you accepted that?

A. We accepted it.

Q. All right. Now, what—as I understand it, when you—your original conversations or discussions, your proposals contemplated that you might put on more than one—more than a second furnace—might have, perhaps, multiple furnace operations?

A. Well, that's all the provision engineer makes. He doesn't know—

(Testimony of Robert R. Jones.)

Q. Well what did Mr. O'Neil say about that?

A. He wouldn't stand for it. He said, "No", he wasn't interested in more than two furnace operations here.

Q. I see. So, he laid down this condition that—

A. He laid down that condition.

Q. —to have the one furnace operation as an initial block and the second furnace operation as one additional block of power?

A. That's right.

Q. Now, you said one of the things you were concerned about—you—Ohio was concerned about was the right to take the furnace for the second block, suspend the taking and later on resume the taking of current for that block?

A. That is correct.

Q. In your negotiations with Mr. O'Neil what was said—done about that? [173]

A. That was provided for.

Q. How—what did Mr. O'Neil say and what did you say and so on?

A. It was provided for in this way. Mr. O'Neil said that after it's first use——

Mr. Carothers: Just one minute.

The Court: I think I shall sustain the objection to all this detail and discussion, Mr. Metzger, that is set forth finally in the contract. What we're concerned with is the contract and not all of these details, and I will sustain an objection. I assume that one was made.

Mr. Carothers: Yes. I object.

(Testimony of Robert R. Jones.)

Mr. Metzger: If your Honor please——

The Court: If he wants to talk about what's in the contract and you desire to ask him about any particular paragraph of the contract that is pertinent to the controversy here, why you'll not be limited or denied that right, but surely we must give some consideration to a written contract as it was finally and solemnly promulgated and put forth.

Mr. Metzger: That's true except that it——

The Court: You can't vary its terms by what one witness says his understanding was and another——

Mr. Metzger: Well, I—I'm not trying to [174]

The Court: Well, let's get along now. If you have some particular questions you wanted—on the phase of the contract.

Mr. Metzger: All right.

Q. Mr. Jones, if you'll take a look at the contract in evidence here—I don't know what the exhibit number is now—and turn to Article 10, sub-paragraph (A). The caption of that sub-paragraph says—the caption of the Article is Alteration or Cancellation of Contract Demand. The caption of sub-paragraph (A) is "For contract demands in excess of the initial block of six thousand five hundred (6500) kilowatts." To what does that refer?

A. That refers to the second block—second furnace block.

Q. Second block. In other words, this contract provided for two blocks of power?

A. Correct.



(Testimony of Robert R. Jones.)

Q. Now, in that sub-paragraph (a) there is a provision—think it's in the second paragraph—"In the event the corporation elects to exercise its right of alteration,"—"and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City's judgment, surplus power is available in sufficient quantity to meet the Corporation's additional requirements." Now, in respect to that paragraph—to that sentence Mr. Jones, in your negotiations with Mr. O'Neil, what did he say as to what—about surplus power?

A. Surplus power was understood and discussed and agreed to there, was that power which the City had had or might have available over and above a—commitments to their contract customers or to their regular customers at that time.

Q. What did Mr. O'Neil say about the phrase in this sentence that I have read to you, "in the City's judgment"?

A. Well, of course the City would have to exercise its judgment in that because it alone had the data. We had no data upon which to exercise our judgment as to how much power the City had available.

Q. So it was the City's judgment as to whether they had surplus power?

A. Correct.

Q. But if they had surplus power and you wanted it, you could resume operation on the second furnace?

A. Yes, sir.

(Testimony of Robert R. Jones.)

Q. Is that right? A. That's right.

Q. Now, what you said about the definition or discussion of surplus power, the term is then understood or [176] defined—is that your definition or connotation of that term in the electrical world—

A. That's the common use of that term—that term is commonly used.

Q. Now, the next sentence in that paragraph, Mr. Jones, "If and when the Corporation and the City mutually agree that the City will again deliver power," it says "such service will be on a firm basis and payments for the energy used shall be made according to the provisions of the contract." What was said, if anything, about—by Mr. O'Neil—the City, what was meant by "payments for the energy used"?

A. Why it meant just that—that we would pay for the energy we took at the time we took it, and certainly not for the time we didn't take it.

Q. Well, now, let me—let me get this clear. This contract makes no provision for a consumption or energy rate, as such, does it?

A. Except in the starting period, no.

Q. Except in the starting period—the first six months when you're getting underway.

A. Yes.

Q. It's all on a demand basis?

A. All on a demand basis.

Q. Whether it's the first load or the second load? [177]

A. It's on a block power basis, really.

(Testimony of Robert R. Jones.)

Q. I see. So actually, at no time, was payment made on the basis—exactly of the energy used?

A. No, sir.

Q. Payment was always based on the demand—that is, on the possible—total amount you could use?

A. Yes, sir.

Q. And so herein, the term “payment for the energy used” is payment for the time you had the right to impose the demand for the second block?

A. That is—that was our understanding.

Q. Is that what Mr. O’Neil said to you?

A. Mr. O’Neil said that, yes.

Mr. Carothers: We still object to all this testimony.

The Court: It isn’t very helpful to The Court in interpreting the issues that are being submitted.

The sum and substance of this paragraph was that if they went on again with the second unit, they’d have to pay at least for 6000 kw’s.

The Witness: Correct.

The Court: And then if they exceeded 6000 kw’s at any time, they’d pay on a demand basis.

The Witness: Yes, if they exceeded 6000 kw’s at any time coupled with the other unit, well then [178] the “ratchet” clause would go into effect, and they’d pay on the then demand, which would be the billing demand.

Mr. Carothers: You’d combine—if the two furnaces exceeded 12,500.

The Court: I understand that and I think that is quite clear. What we are primarily concerned

(Testimony of Robert R. Jones.)

with in this case, of course, is—as to whether there was a suspension on the provision of Section 19 of the contract, or whether there was a suspension by mutual agreement and whether the second taking that actually did occur here, was a new taking so it would be covered by this one year's liability.

Mr. Metzger: Well, partially. The first two phases are correct, your Honor. The second phase, I'm not so—I think is important and I think this contract is not clear, and that's why I think the circumstances under which it was entered into and the terms as understood by the parties who negotiated is proper.

The Court: The Court isn't going to go into that because to me, it is clear enough, Mr. Metzger. It's clear enough for the purpose of—the Court hasn't judged upon this particular phase of it. If there was any particular discussion about this thirty day notice, I would be glad to have if this witness discussed with the [179] other parties, as to what constituted a thirty day notice.

Mr. Metzger: I don't know.

The Court: Frankly, your—the admitted facts here throw very little light upon that. The testimony so far hasn't—whether a letter had been written that within 30 days from this time we are going to cease to take the power for the second unit, and then 30 days came and they continued to take power. Now if there is anything—if there is anything—any discussion——

Mr. Metzger: Well, there is no discussion about

(Testimony of Robert R. Jones.)

that so far as I know. May we recess at this time, if your Honor please?

The Court: We've got to finish this case today, Mr.—

Mr. Metzger: I appreciate that——

The Court: And I don't know——

Mr. Metzger: ——the desire of the Court to finish.

The Court: ——how many witnesses the City has.

Mr. Carothers: I think in view of the statements the Court has made, the defendant can shorten considerably our testimony because the position the Court has taken would indicate that the Court considers that testimony more or less immaterial any way—that is, all these discussions leading up to the signing of the contract. [180]

The Court: Well, I think the discussions and the exchange of correspondence and so forth between Mr. O'Neil and the parties, are very material.

Mr. Carothers: You are referring to the suspension?

The Court: That's right.

Mr. Carothers: I was speaking of the negotiations leading up to the contract, your Honor.

The Court: That, I shall have to limit the testimony substantially in that regard, because doubtless there were many hours of conversations and discussions.

Mr. Metzger: Well, we're not going into anything except that bears on this point.



(Testimony of Robert R. Jones.)

The Court: As a matter of law, of course, unless the contract is ambiguous in its terms, it's the culmination of all these various negotiations, and the Court will not lightly set any part of it aside, unless it is so ambiguous or uncertain that we can't—

Mr. Metzger: Well, we don't ask that any part be set aside. We ask merely that it be interpreted.

The Court: Well, there are two things that I am going to have to interpret here, as I have indicated. One is, whether there was a suspension by reason of some [181] situation arising beyond the control of the parties under this Section 19 of the Act, or whether it was by mutual consent and agreement, both parties feeling it was to their advantage to suspend at the time. There is no question involved here but that there had been a use for the twelve month period.

Mr. Metzger: Yes, sir.

The Court: That is conceded by all of the parties. And then, whether this resumption was a resumption under the provisions of this contract,—that required another twelve months before there could be any change made, or whether it was just a taking up where the break had occurred earlier and it was subject to suspension then under the thirty day limitation—thirty day notice as provided in the contract.

Mr. Metzger: That, I think your Honor—your Honor's statement to me indicates that your Honor is slightly confused in that phase of the case. The issue—the first two propositions are these: If this

(Testimony of Robert R. Jones.)

suspension excuses under Article 19, then we have in effect a continuous taking until the time whenever it was dropped in 1945 or '46, and that's that.

Then we have the question whether it was a—a taking which, by mutual suspension—the original suspension, was wholly outside of the contract and it [182] doesn't count, so that the suspension in '45 was an initial suspension. Then lastly, we have the question which is the declaratory part of the question, the case. That's the interpretation of this contract, so in the future, in the event we should—the City and the Company should agree to resume delivery to this second furnace, would the Corporation have to take and pay for a year's operation or could they take and—if the City agreed that they might, and then suspend after taking for six months and only pay for six months.

Mr. Carothers: You don't mean by agreement.

Mr. Metzger: No, by the terms—but I said, if the City and the Corporation should mutually agree to resume delivery. That's the language of the contract, then the contract says that we take it and we can alter it downward upon three—one month's notice. Then the question is, if we do that, of course, the City may never agree, the City may never have surplus power, but we're asking the Court to determine what our rights are in case they should. We contend that under the terms of this contract, properly construed, if that event occurs or if it has occurred in the history of this Corporation, that our liability for taking this—on the second taking of

(Testimony of Robert R. Jones.)

the second block or second load [183] is limited for the months that we took it.

The Court: Well I have several questions in mind, but I'm not going to ask them now because we would be here until one o'clock.

We'll now take an intermission until two o'clock this afternoon.

(Recess.)

---

2:00 o'Clock P.M.

The Court: Now, you may proceed, Mr. Metzger. I don't think you had finished your direct examination, had you?

Direct Examination

(Resumed)

By Mr. Metzger:

Q. How extensive has been your experience and practice as an electrical engineer?

A. I have an engineering degree from the Stevens Institute of Technology, in the Class of 1901, and I have been connected with power work, in one form or another, substantially ever since that time.

Q. Just briefly, do you work for any public utilities, electrical——

A. I never have.

Q. What?

A. No, not in the period I am testifying about now; I did work for some railway companies before I went to college.

(Testimony of Robert R. Jones.)

Q. Now, your work has been since 1901 largely in the electrical field?

A. Not altogether, electrical and mechanical.

Q. Mr. Jones, to an engineer, particularly to an electrical engineer, the contract relating to the supply and the taking of electrical energy, what does the term "load" [185] mean?

A. Why "load" generally speaking, means a block of power, or a quantity of power.

Q. Quantity of power. Well, now, referring to the contract which you have in your hand, Exhibit 2, I think——

The Court: The Exhibit's right on the front of the document.

Mr. Metzger: 5—Exhibit 5.

The Court: Exhibit 5.

Q. And turning to Article X, I think it is the last paragraph of sub-section (a). There is an expression in there: "and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load"—what, as an electrical engineer, one versed in contracts for electrical energy—what does that term "this load" refer to, in that contract?

A. What paragraph was that, Mr.——

Q. Section 10, subsection (a). I think it is the last paragraph, it's in, or the last unnumbered paragraph just before the sub-paragraph beginning (b).

A. Oh, over here. Well, that refers to the 6,000 kilowatt block.

(Testimony of Robert R. Jones.)

Q. You mean the block for the second furnace?

A. The block for the second furnace.

Q. And the expression "at least twelve (12) consecutive [186] monthly payments"—is the twelve consecutive monthly payments that were required to be made at the first taking from that block, or load?

A. Why, they required twelve consecutive monthly payments on that block, and——

Q. When it says in that same paragraph that—just referred to "at least twelve consecutive monthly payments," that means the first twelve monthly payments that were required when the Company first took this second block of power?

A. Correct.

The Court: It doesn't seem to me that's a matter of interpretation at all; it's as plain as can be, and there isn't any question. The Court understands that, Mr. Metzger.

Q. Mr. Jones——

The Court: I would like to have the witness explain what he understands by the term "ratchet clause."

The Witness: Well, your Honor, a ratchet clause is a term that applies to demands taken over, the contract demand, in which the——

The Court: The charge is made on a peak load thereafter?

The Witness: For eleven months.

The Court: Or for a month, or whatever it is.

The Witness: Well, whatever the ratchet clause [187] in here—generally speaking, it is for a term



(Testimony of Robert R. Jones.)

of months. That billing demand obtains and holds for that time, whatever is specified in the contract.

The Court: Well, it's conceded here, isn't it, that it holds for a month, or for the whole twelve months?

Mr. Carothers: It holds for eleven months.

The Court: For eleven months, then?

Mr. Metzger: That's not conceded, your Honor.

The Court: Which is this ratchet clause in your contract—which clause is the ratchet clause?

Mr. Metzger: You'll find it, your Honor, please, I think there is no dispute about it, as a matter of fact, if you will turn to paragraph 7, of the contract——

The Court: Under "Billing Demand?"

Mr. Metzger: Yes, a proviso at the end of that paragraph, it says: "provided, however, that the billing demand for any month shall not be less than the highest actual demand which occurred during the immediately preceding eleven months——

The Court: I see.

Mr. Metzger: Well, that is, I think, conceded by everybody to be the "ratchet clause" of the contract. I don't think there is any dispute about it. As a matter [188] of fact, the only time the word "ratchet" clause is used, it says: "the ratchet clause specified under Billing Demand."

Q. Mr. Jones, you're familiar with the devices installed by the Ohio Ferro-Alloys Corporation to record and limit demands imposed upon the City's electrical facilities?

A. I am, I designed it.

(Testimony of Robert R. Jones.)

Q. Of what do they consist?

A. Well, the power coming into the plant comes first through the City's ratio transformers, and then through a similar set on our bus bars, there being only a short distance between them and no use of power so the same current passes through one as through the other. These current transformers operate a watt hour meter, recording the energy used by the plant in kilowatt hours. That watt hour meter is there principally to operate a demand limiter, which—this demand limiter the General Electric makes, is operated by impulses from this watt hour meter, which receives its energy or its portional energy from the current transformers. The demand limiter has on it two contacts, adjustable contacts. It is a machine in which a hand rotates every thirty minutes, which is the demand cycle; and it has a pair of hands which oscillate up and down every thirty minutes, or every demand cycle; and one of these hands rises steadily, and the other [189] hand rises as the demand is made. If it gets ahead of the ideal demand hand, which is the first one, showing that we are taking power faster than we should, then an alarm is sounded; and after a few seconds' time delay, it trips the oil circuit breaker on a furnace. The furnace that is—one of the furnaces that is energized. If we are operating two, it trips one of them; if we are operating only one, it trips that one, thereby stopping all power until the beginning of the cycle

(Testimony of Robert R. Jones.)

again, when we can again throw in the furnace. Well, that's demand limiter.

Q. Under the operation of that furnace, or that demand limiter if set to trip or open the oil circuit breaker, that you speak of, below 6,500 kws.—

A. It will open it wherever it is set.

Q. Well, if the limiter is set below—say 6,380?

A. If it's set below 6,500, or if it's set at 6,380, it would take the furnace off when it reached that point.

Q. And that demand limiter is set at the beginning of where the power comes into the plant, is that right?

A. Exactly, it's operated from the same *radio* transformers at the entrance to the plant.

Q. At the City's—the same potential or ratio transformers that is the same as the City's?

A. Well, the City—they're similar—the City have theirs [190] on a pole out there, and ours are in our switchboard structure. Now the second limiter is a—operating off the same ratio transformers as the Westinghouse demand curve drawing, or strip chart demand meter, which draws for each half hour, a curve or a line, the height of which represents the power taken in that area. Now it, too, has contacts—an adjustable contact that can be adjusted to limit the height what this line may reach before the contacts are energized; and once they are energized, it also trips the circuit breakers.

Q. Well, so we don't confuse the Court or counsel, this graphic demand meter, or Westinghouse

(Testimony of Robert R. Jones.)

graphic demand meter, was not set up to act as a demand limiter, prior to some time in 1946, was it?

A. I don't know when it was energized.

Q. You don't know?

A. No, I don't know.

Q. So as far as you are concerned, you are not here to make any claim that it was?

A. No, I don't know.

Q. Now, the chart or graph that this Westinghouse demand meter makes, did you as part of your duties, did you, or did you not examine that chart, during the time the—from say the 1st of September last year to the end of February—from the 1st of September, 1945, to the end of [191] February, 1946?

A. I couldn't say that I examined them all. I examined all that came to me, and most of them came to me.

Mr. Boyle: We are objecting, your Honor—we renew our objection to all this oral testimony about this graph. They haven't explained yet why——

The Court: I think I shall sustain the objection. If this graph is material, it must first be shown that it's not available. If he has an independent recollection, and if it is available, it would be the best evidence.

Q. Well, Mr. Jones, do you know where that record is, that chart?

A. No, sir, I do not. I suppose you mean the one for December, January——

Q. Well, I mean for the period, for say——

(Testimony of Robert R. Jones.)

The Court: Mr. Metzger, it seems to me this witness naturally wouldn't know. He is just a consulting engineer, he wouldn't know——

Mr. Metzger: That's right, I think that is correct, your Honor. Well, I would still like to recall this witness, or I could send an interpellator witness here to show that that graph——

The Court: No, if this graph is available and you want to make use of it, as an evidentiary fact, [192] why it should be brought here and offered as evidence. If it's lost and someone has examined it, why, of course, they can give what their recollection is of its reading.

Mr. Metzger: Well, that's——

The Court: Now, you'll have to take one of the other positions; if you've got it——

Mr. Metzger: Well, that's the point, if your Honor please, for my information, I would have to put Mr. Cunningham on the stand; he's been in communication with Canton, and he informs me that it's believed to be in Canton, but it has not been located. Now it's in Ohio and we can't get it here, and I think that's a correct statement.

Mr. Carothers: Both Mr. Cunningham and Mr. Pritz testified positively in direct examination they were over to the plant here the other day, but Mr. Metzger said it was thirty or forty feet long, and it was too burdensome to bring it here, and when we demand the right to inspect it, it ends up in Canton.

The Court: Well, just a few pointed questions to this witness concerning that, and that's all that



(Testimony of Robert R. Jones.)

is necessary; and from that, if he examined it for any particular period and has an independent recollection of what it really was, why the Court will permit him to state. [193]

Q. Well, did you examine that chart for any period during the latter part of 1945 and the first two months of '46?

A. I examined them, and calculated the short piece of chart sent me, purporting to be for the latter part of December and for the early part of January——

Q. And that's all?           A. That's all.

Mr. Metzger: No further questions then if that is all that you examined.

The Court: And that's the piece that's in evidence.

Mr. Metzger: That's the piece that's in evidence.

The Court: And is that all the direct examination?

Mr. Metzger: I have only one more question.

Q. In addition to this demand limiter—General Electric demand limiter and the Westinghouse portable demand meter, did the Ohio Company have installed any other devices that in any way recorded or regulated or controlled the amount of electrical energy that could be taken at any one time?

A. No, sir.

Q. Did they have any sort of a recording device that [194] indicated and recorded the quantity of energy that was being taken?

(Testimony of Robert R. Jones.)

A. Well, they had those two instruments, or that one instrument that recorded the demand, and——

Q. Did they have any instrument specifically. Some testimony here has been given about the furnace transformer instrument relating to the heat of those transformers?

A. Oh, yes, the furnaces are both—each individual transformer, one transformer on each furnace, both of them are equipped with hot spot indicators and recording temperature gauges and temperature thermometers; and they record the temperatures, presumably the hottest spot in the line of those transformers.

Q. And there's—do I understand that there is a separate transformer for each furnace?

A. Yes, sir.

Q. Well, what does that temperature recording instrument—what does it say?

A. It is supposed to show the temperature of the windings of the transformers. The temperature, as the transformer's load is increased, the temperature is increased by—due to the resistance of the transformer and other things, so that the more load it has on it, all other things being equal, the higher its temperature rise is.

Q. I see. What is the effect of a sudden increase? [195]

A. Those hot-spot indicators are extremely sensitive, and they show the influence of a sudden increase within perhaps five minutes.

(Testimony of Robert R. Jones.)

Q. Well, if you were carrying a load on this transformer of say 6,300 kilowatts; and it suddenly increased to 7,500 kilowatts, would that be recorded or registered, or shown in any way by these temperature recorders?

A. That's what they're for, to show that kind of a thing, and it would show an increase in temperature.

Q. Would it be noticeable?

A. Yes. Since 6,300 is already an overload on the transformer, it would show a decided increase.

Q. Handing you two circular sheets marked for identification Plaintiff's Exhibit 13, ask you what they are?

A. They are charts from the recording thermometer.

Q. Well, assuming that the two—sides of that exhibit that are unruled, are records for December 31, 1945, and January 1, 1946, what do they indicate as to whether there was any imposition of any demand above 6,500, on either of those dates.

A. Well, it is hard to answer that question, in just that way, but I will say this; that the safe temperature of the transformer was not exceeded on any of these charts, and if it was approached quite often, I can see nothing here to indicate any particularly high load. [196]

Mr. Metzger: That's all.

The Court: Are you offering those in evidence?

Mr. Metzger: I think we'll have to identify them a little further before I offer them, your Honor.

(Testimony of Robert R. Jones.)

The Court: Do you have any objection to them being received?

Mr. Carothers: No objection.

The Court: They will be admitted.

(Whereupon recording thermometer chart referred to was received in evidence and marked Plaintiff's Exhibit No. 13.)

Cross-Examination

By Mr. Carothers:

Q. Mr. Jones, you were employed specifically to come out here to—called as a representative of the Ohio Company and negotiate this contract?

A. Yes, sir.

Q. With the City? A. Yes, sir.

Q. And you were here at the time the final draft was agreed upon, everybody was satisfied, and the Council passed an ordinance approving it in the form that you agreed upon, with our representative?

A. Well, not while I was here. They say that points were [197] agreed to, yes. The contract so far as I recall it, was not written until some time afterwards.

Q. It does determine things as it was agreed upon. A. I understand it, yes.

Q. You were thoroughly familiar with the terms at that time? A. Yes, sir.

Q. So that you understood that in the event, as is provided in Section 19—I should say Section 10, where the contract provides that the second furnace having been once put off and then the City and

(Testimony of Robert R. Jones.)

Company agreeing that it might go on the second time, the contract says: "if and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis"—you know that?

A. Oh, yes.

Q. Now you made some reference in your testimony to surplus power this morning.

A. Well, it's in the contract here, regarding surplus power.

Q. Well, it would be surplus firm power, would it not?

A. It would be, yes.

Q. In other words, if the City saw fit to let the second furnace come back on, the Company would have the right to keep that furnace on for the duration of the contract, is that true? [198]

A. Well, that would depend, Mr. Carothers, principally on what was mutually agreed upon.

Q. Will you point to anything in the contract that makes any reference to any mutual agreement, other than the mutual agreement as to whether or not the City would permit them to come back on.

A. Oh, no, the mutual agreement could cover lots of things, at least that's the way I understood it.

Q. That's if and when the Corporation and the City later mutually agreed that the City would again deliver power to the Corporation, yes, but what other mutual agreements could be entered into at that time?



(Testimony of Robert R. Jones.)

A. Anything that the two parties would agree to.

Q. Well, will you point out any provision in the contract that permits such an arrangement?

A. Except here it says that when the City and the Company's representatives mutually agree——

Q. To what?

A. The City shall again furnish power.

Q. Yes.           A. ——but——

Q. It will be on a firm power basis, would it not?

A. That's right, it would be if they agreed it would be on a firm power basis.

Q. The contract says it would be, doesn't it?

A. That's right.

Q. And later on, in the same paragraph, the contract states that the energy used, if they put it back on, would be paid—energy used and the bills paid accordingly to the provisions of the contract. In other words, they are going to pay for it according to the provisions of the contract, isn't that true?

A. They are going to pay for it as they use it, it says there.

Q. Turning to Section 4, (b-3) of the contract, that paragraph refers to—deals with the second furnace, does it not?           A. Yes, sir.

Q. And the last clause provides that: "except that the continuous and uninterrupted part year operation immediately following a full year's billing at the specified rate, shall be pro rated." What does that clause mean?

A. It means you pay for it after the first twelve months at the——

(Testimony of Robert R. Jones.)

Q. Now just a minute, what basis——

Mr. Metzger: Let him answer. You asked a question——

Mr. Carothers: Now I insist, your Honor, please——

A. After the first twelve months' continuous use, then you [200] —it is substantially billed by the month.

Q. Well, the provisions state in so many words that the "continuous, uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be pro rated," does it not? A. That's correct.

Q. You were familiar with that provision when you helped write it in the contract, were you?

A. This, of course, refers—I was. This refers to the first taking.

Mr. Metzger: You mean the first taking of the second block?

The Witness: The first taking of the second block.

Q. Well, this clause—this paragraph—is set up under Section 4 which deals with rates to the Corporation, does it not? A. That's right.

Q. And if you were familiar, as you state you were, as to all the terms of this contract,—if you expected that paragraph to apply only to the initial operation of the second furnace, why did you overlook requiring that the City so provide, in view of what you state your conversations and understanding with Mr. O'Neil was?

(Testimony of Robert R. Jones.)

A. Well, I know that paragraph did refer to the first [201] taking, and only that.

Q. Well, does it so state?

A. No, I don't know that it does so state.

Q. When and where did you examine this section of the record for those three days?

A. That demand meter chart?

Q. Yes. A. In Canton.

Q. Was it part of the big chart at that time?

A. Yes, just as you see it.

Q. You have no idea where the rest of that chart is? A. I do not.

Q. As I understand the setup at the plant, the City had its transformers, and then the company had a transformer for each furnace, isn't that right?

A. Well, yes, it has those, but I didn't say so. I said it had a set of metered transformers immediately following the City's.

Q. Yes.

A. On the mainline income. It also has transformers at each furnace.

Q. The City's transformers that was in the original installation was two 10,000 capacity transformers, were they not?

A. We are not talking about the same transformers.

Q. Well, I'm asking about——[202]

A. Yes. You are asking now about the incoming——

Q. That's right.

A. No, the original installation was a different

(Testimony of Robert R. Jones.)

transformer. I don't know what it was—the original, the first installation—I don't know what it was, I don't remember. And then following that, to answer your question, the City put in two plants of 10,000.

Q. What's the capacity of the Company's transformers?      A. 6,000 kva. each.

Q. The first one operated at 6,500, with a 6,000 capacity.

A. No, it takes some power to run the plant outside of the furnaces.

Q. Well, this demand limiter that you have been referring to, at least one of them is located on the furnace, is it not?

A. No. The demand limiter, the physical location, is at the furnace——

Q. Yes.

A. ——but it receives its impulses from the metered transformers on the incoming bus compartment. It is physically located out there, so the men and operators can see it.

Q. How much of a load does it take to heat up your—the Company's transformer to a—approaching a dangerous point? [203]

A. Well, the specifications on the transformers, the guarantees on which they were purchased, is a 55 degree centigrade wire for a full load; now that means that that full load, that 25 degree centigrade wire, which is about what we get out here, the top temperature will be about 80 degrees centigrade for 6,000 kva's.

(Testimony of Robert R. Jones.)

Q. It's not unusual for those—the load to go considerably beyond that—considerably beyond that point, does it not?

A. It depends on the temperature you are running your transformers. You're probably safe in that, but not over that.

Mr. Carothers: That's all.

Mr. Metzger: That's all.

(Witness excused.) [204]

---

J. W. WEITZENKORN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, please?

A. J. W. Weitzenkorn.

Q. W-e-i-t-z-e-n-k-o-r-n? A. Correct.

Q. And where do you live now, Mr. Weitzenkorn? A. Sarasota, Florida.

Q. How long have you lived there?

A. Since October, '44.

Q. Were you formerly active with the Ohio Ferro-Alloys Corporation? A. I was.

Q. In what capacity?

A. From '42 to the time of my leaving, I was the executive vice-president. From '39 to '42, I was the assistant to the president; from '36 to '39, I was director of research.



(Testimony of J. W. Weitzenkorn.)

Q. And when did you leave the employe of the corporation?      A. In October, '44.

Q. In October, '44? [205]

A. To be correct, it was September.

Q. That's when you went to Florida, am I correct in that?      A. You are correct.

Q. Now, you're the gentleman who came with Mr. Jones out to Tacoma; and did carry on here the final negotiations leading up to the contract that's involved in this lawsuit, is that correct?

A. I am.

Q. When was that that you arrived?

A. The latter part of January, in '41.

Q. '41, with whom did you carry on those negotiations?      A. With Mr. O'Neil.

Q. Was there anyone else representing the City?

A. Well, Mr. Kent was there a large part of the time.

Q. I see. Now, when you commenced these negotiations, eliminating anything else, because confining your answers solely as they bear upon the second block of power; that is, the power for the second or more furnaces? What were the points of differences with which you started the negotiations?

Mr. Carothers: Now, your Honor, we don't have any objection to taking the Court's time if the Court wants to listen to it. We concede he will make the same statements as Mr. Jones made.

The Court: Well, I don't know whether he [206] will or not, but if you will direct his attention to something that you have in mind, counsel, in your

(Testimony of J. W. Weitzenkorn.)

question, why we will get along much better. They may have had many points of differences that aren't involved here at all.

Mr. Metzger: Well, I was trying to avoid the objections, your Honor, that I was guilty of leading questions.

The Court: Let's proceed.

Q. Mr. Weitzenkorn, when you entered upon those negotiations the Ohio was seeking power for the operation of—or for how many furnaces was Ohio seeking power? A. Two furnaces.

Q. Two furnaces. They had been asking for more, had they not? A. They had.

Q. And what was the City's answer to that?

A. Well, they would only consider a definite additional load of 6,000 demand.

Q. And now under what conditions would they give that additional load?

A. Well, I wanted complete flexibility: that the Company had complete control over the stopping and starting of that additional load, and only pay for the energy when and as if we used it, but Mr. O'Neil insisted that he be [207] remunerated, or rather the City, be remunerated for the installation that would be required by them to take care of this additional load; and he offered that if we take the power continuously, or commit ourselves to a continuous use of that power, or that additional load, for 12 months, then thereafter, after that use, any additional use would be only on the actual energy used.

(Testimony of J. W. Weitzenkorn.)

Q. What was the attitude that he took and what did he say in general, about your proposition of flexibility, coming on and off?

A. He didn't agree to my request. He insisted that if we take the power and then once drop it, we can only go back if the City permits us to go back; and that was based entirely on—in their hands—as to the ability to give us sufficient power.

Q. Well, once they did permit you to cut down, then what?

Mr. Carothers: Your Honor, we renew our objection.

The Court: Well, I want to hear his answer to this question.

A. If he were permitted to come back, then we could use the power as long as the Company required it.

Q. Well, how about paying for it?

A. We paid only for the energy, or demand, actually used.

Q. And you could drop it on thirty days' notice, or something [208] like that? A. We could.

Q. And not be required to pay for it after you had dropped it? A. That is right.

The Court: Well, what about dropping it after twelve months, when you initially went on? Was it your understanding that you were being obligated to take it for the full period of ten years, or until 1951, if you once started taking it?

The Witness: No, sir.

(Testimony of J. W. Weitzenkorn.)

The Court: Couldn't you drop it then at the end of—if it had been used for twelve consecutive months by a thirty-day notice?

The Witness: We could drop it at the end of a continuous use for twelve months.

Q. Well, you could drop it before that, but you would still have to pay——

A. We would have to pay for a twelve months' use—for the first twelve months' use.

Q. And now we are talking about a resumption—in case you were permitted to resume after you had once dropped it; then in that case, as I understand you, you were permitted to resume, if the City and the Company mutually agreed, you would again be permitted to take it, you [209] could again drop it, but you would pay for it for the time covered between the time you agreed to go on and the time you dropped it. A. That is right.

The Court: At what rate, or what amount?

The Witness: Based on the demand base covering the period of time that we used the power.

The Court: Not on 6,000 kws.?

The Witness: We paid—there was an accumulation of the contract demand of 6,500 plus the 6,000, for that period of time that we actually used that combined load.

The Court: You say that was the understanding of the kind of a contract that you finally entered into?

The Witness: Yes, sir.

Q. Now, Mr. Weitzenkorn,——

(Testimony of J. W. Weitzenkorn.)

The Court: Well, just a moment, I want to say something. The contract reads "if and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation additional power requirements, such service will be on a firm power basis, to be altered downward only on the Corporation—only by the Corporation upon at least one month's written notice to the City whereupon payment for the energy used shall be made according to the provisions [210] of this contract"; did you understand that language in the contract to be that you would pay on the basis of 6,000 if you used that, or less?

The Witness: I understood that that meant that we would pay for the additional load when we used it, and during the time we did use it.

The Court: Well, I am assuming that if you went back onto the use of it, you used it, or some of it.

The Witness: That's it.

The Court: —but if you didn't use the 6,000, you mean you wouldn't pay for it?

The Witness: We wouldn't pay for that additional load.

The Court: If you only—if you went back and started the second furnace, but only used a 1,000 kws., you would only pay for a 1,000, instead of 6,000?

The Witness: We would only pay for the demand created.

The Court: Well—



(Testimony of J. W. Weitzenkorn.)

The Witness: On the 1,000, that's right, sir.

The Court: Proceed, Mr. Metzger.

Q. Mr. Weitzenkorn, I wonder if you understood the Court's question. This contract, in your negotiations, contemplated power being delivered, furnished in two separate [211] blocks, is that not correct?

A. That is correct.

Q. The first was the initial block of 6,500 kilowatts? A. That is right.

Q. And as far as that contract is concerned,—that block of power is concerned, that was furnished on a demand rate basis and you paid so much per month, for 6,500 kilowatts of demand, irrespective of the quantity you used, as long as you don't use more than 6,500? A. That is right.

Q. That is right. Now, if you take the second block of power as the initial taking, as I understand you, you had to pay for 6,000 kilowatts of power per year, whether you used it or not?

A. That is right.

Q. Now, if you take it on again——

The Court: Well, let's ask him this question; suppose it never went off at the end of twelve months, but just kept using it month after month, until the——

Q. You would continue to pay for that how long? A. As long as we used it.

Q. As long as you used it, but if you did go off and you resumed, then whether you took it at the rate of a 1,000 kilowatts a month, or you took it at the rate of 6,000 kilowatts a month, for the

(Testimony of J. W. Weitzenkorn.)

contract purposes, and [212] for payment purposes, you would pay at the rate of 6,000 kilowatts a month, wouldn't you?      A. That is right.

Q. That's good. Well, that is the way we understand it, but I thought you had some——

A. Well, I misunderstood the Court, I'm sorry.

Q. As long as you took it under a resumed taking, you pay for it on the basis as if you were taking 6,000 kilowatts a month, whether you were taking that much or not?      A. That is right.

Q. The actual number of kilowatt hours you took at any time, then—either on the one block or the other made no difference under this contract?

A. It did not.

Q. Now, Mr. Weitzenkorn, while you were, I think executive vice-president of the Company—strike that question. After this contract was entered into, did you have some correspondence with Mr. O'Neill regarding the contract in which you were asking for a modification of it, particularly with respect to the escrow clause?      A. I did.

Q. And Mr. O'Neil replied to you in writing?

A. He did.

Q. Handing you a letter, marked Plaintiff's Exhibit 6, I ask you if that is in reply to that—to your——[213]      A. It is.

Q. Now, sometime thereafter, did you have occasion to request of the City that you suspend—that the Ohio be permitted to suspend operations of the second furnace, under Article XIX of the contract?

A. I did.

(Testimony of J. W. Weitzenkorn.)

Q. Handing you again a letter marked Plaintiff's Exhibit 7, is that your letter making that request?      A. It is.

Q. And Exhibit 8, Mr. O'Neil's reply?

A. This is Mr. O'Neil's reply.

Q. Further correspondence ensued, culminating in Mr. O'Neil's letter of April the 11th, which I believe is Exhibit 11, is that correct?

A. This is correct.

Q. Well, I mean is that where the correspondence culminated?      A. It did.

Q. After that, and in accordance with that letter, Exhibit 11, did Ohio Ferro-Alloys Corporation suspend operation of the second furnace?

A. It did on April 26th, I believe.

The Court: Of '45?

The Witness: Of '44.

Mr. Metzger: Of '44. On that connection, if your Honor please, the City has made demand on us to [214] admit the genuineness of certain letters, including the letter of April 24, 1944, relating to this shutdown, which we ask be marked, and we offer it in evidence.

Mr. Carothers: It may be admitted, we have no objection.

The Court: It will be admitted.

(Whereupon, the letter referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

(Testimony of J. W. Weitzenkorn.)

Q. Mr. Weitzenkorn, in your letter of March 21—which I believe the Court has, you referred to—based your request upon interference by orders of the War Production Board, is that correct?

A. I did.

Q. Did you personally have anything—or any connection with the War Production Board?

A. I did.

Q. What was that?

A. I was a member of the Advisory Committee to the War Production Board covering chromium and silicon.

Q. I see. Well, now, the orders that you referred to in this letter of March 21st were, in general, what? What orders of the War Production Board did you refer to?

A. There is an order that when it became effective as an order from the War Production Board in January of 1944. [215] That covers orders to steel people to use large quantities of scrap to manufacture their alloys. The motive was to conserve the supply of chromium.

Q. Well, what was the situation with chromium at that time?

A. Chromium was the—an essential element that the War Production Board and the Government were trying to conserve, and there was a limited quantity available. Therefore, this order was directed to the use of scrap containing chromium, in order to conserve the supply.

(Testimony of J. W. Weitzenkorn.)

Q. Handing you photostatic copy of War Production Order M21A direction 4, dated January 21, 1944, and ask you if that is the order to which you have been referring?

Mr. Metzger: We offer the same in evidence.

The Court: It will be admitted.

(Whereupon War Production Board Order referred to was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. Now, some time prior to that——

Mr. Metzger: I want to take up that later—more about that in a moment——

Q. ——was there an earlier order on the War Production Board?      A. There was.

Q. That affected or interfered with the Ohio's production?      A. There was. [216]

Q. What was that order?

A. In October, '43, allocations were dropped of chromium——were dropped by the War Production Board. Now that directly affected the operations of the Ohio Ferro-Alloys, in that the priorities and allocations were made to supply ferrochrome to the concerns that were normally not their customers. It depended entirely on the desire of the Government to expedite this production of essential material, and to conserve transportation facilities. We were supplying chromium to concerns largely that were not our normal customers; and when the priorities were cancelled or dropped, we had to go out and sell our product and endeavor to regain our position in the trade.



(Testimony of J. W. Weitzenkorn.)

Q. Well, as you say, "priorities," is that the right word, or the correct word—or should we say "allocations"? A. Allocations.

Q. Well, by that I understand you, Mr. Weitzenkorn, that under the Government's system, or War Production Board's system of expediting, or concentrating the war effort, they first inaugurated a system whereby if you wanted to get ferro-chrome, you had to obtain from the War Production Board an allocation? A. That is right. [217]

Q. And that specified from what producer the person desiring it should obtain it, is that correct?

A. That is correct.

Q. And Ohio, as a producer of ferro-chrome, could only supply it on such an allocation by the War Production Board? A. That is right.

Q. When those allocations, or the necessity of them was removed, the whole business of supply and demand was disrupted so far as ferro-chrome was concerned, is that correct?

A. That is correct.

Q. Now, did that allocation affect that cancellation of the allocational requirement of the W.P.A.—did that affect the Ohio Ferro-Alloys' operations, particularly at the Tacoma plant? A. It did.

Q. Explain to the Court how, and to what extent?

A. Well, I have some data that I had compiled under my direction, of actual sales data and the tonnage sold, to show the effect of the——

The Court: Well, can't you just state that——

(Testimony of J. W. Weitzenkorn.)

Q. Oh, just state in general terms.

A. Our sales dropped materially.

Mr. Metzger: Well, that's sufficient.

Q. Did you—at that time you made no request of the City [218] for relief under Article XIX.

A. We did not.

Q. Now, I hand you what is marked for identification Plaintiff's Exhibit 16, is that a copy of the War Production's order revoking allocations, concerning which you have been testifying?

A. This is the former order — of revoking allocations.

Q. Yes. Well, that's the one that you just have been testifying about?

A. No, I don't believe this is the one.

Q. Well, I call your attention and ask you to look at that, in which it says in there: "It will no longer be necessary for you to apply for allocations for ferro-chrome and other alloys," on down, and ask you to examine the whole thing.

A. This does refer to the order I had in mind, it was the date of it that confused me.

Mr. Metzger: All right, we offer the same.

The Court: It will be admitted.

(Whereupon War Production Board Order referred to was received in evidence and marked Plaintiff's Exhibit No. 16.) [219]

Mr. Metzger: Your Honor, please, I think it is in order for me to say that I think the witness has explained it. We are not offering in evidence the original order requiring allocations for deliveries of ferro-chrome. We are only offering the

(Testimony of J. W. Weitzenkorn.)

order revoking the original order, assuming that there was an order in effect, and it is now being revoked, because it is the revocation which the witness has testified had the effect on the company.

Q. Mr. Weitzenkorn, referring then to the later order, January 21, 1941—'44—Exhibit 15, how did that affect the Ohio's operations?

A. By the use of large quantities of scrap in lieu of ferro-chrome; and this was started by the Steel Division of the War Production Board, or about the middle, or the beginning of the fall of 1943, and the steel people recommended to the War Production Board, and proved to them that they adopt what was then known as "m.e. steels," national emergency steels, containing lower chromium, as an example, contents, and the order was finally issued in January of '44, but it went into effect towards the end of the year, and it directly affected us by curtailing the requirement, or use of ferro-chrome.

Q. And what was Ohio manufacturing in Tacoma at that time? [220] A. Ferro-chrome.

Q. Ferro-chrome. Well, now, that order was a Governmental regulation, was it? A. It was.

Q. And to what extent did it affect the Ohio's business?

A. The supply—the supplying of ferro-chrome to the customers, dropped materially.

Q. Well, did it—was it effective so that it made it reasonably impracticable for Ohio to use the second block of power for the operation of the second furnace? A. It did.

Mr. Metzger: That's all.

(Testimony of J. W. Weitzenkorn.)

Cross-Examination

By Mr. Carothers:

Q. This government order that you refer to, directed the manufacture of steel, required that you use scrap, is that right?

A. Will you please repeat your quetsion?

Q. If the government order was directed to, or at, the manufacturers of steel, was it not?

A. It was.

Q. It required them to use larger quantities of scrap? A. Right.

Q. No reference is made in that order to curtail-ing the [221] manufactures of ferro-chrome.

A. Not in those words.

Q. The fact is that the only effect upon your operation was an indirect effect, it depressed the market for ferro-chrome, isn't that true?

A. That is right.

Q. Yes. So it rendered it unprofitable for you to operate?

A. Well, there is more to it than that, Mr. Carothers. The supply of chrome, and chrome ore, was scarce; and the Government issued these orders to conserve the supply.

Q. So as you stated in your letter to the City, it was because of a depressed market for ferro-chrome that led you to request a second furnace?

A. That is correct.

Q. There was no order by the Federal Govern-ment that your operation be curtailed?

A. Not against us directly.

(Testimony of J. W. Weitzenkorn.)

Q. If some situation came about now, so that you had a—you couldn't operate your first furnace at a profit, if you couldn't find a market for the product that you did manufacture, you would have to suffer a loss, would you not?

A. We have to pay for the first block for the life of the contract. [222]

Q. The first block, or the second block, at that time were on the same basis, were they not?

A. We had already paid for it, for twelve continuous months.

Q. As far as Section XIX of the contract is concerned, the two furnaces were exactly on the same basis. Section XIX applied to both furnaces, did it not?      A. It does.

Q. So that if you had a right to shut down the second furnace, you had the right to shut down the first furnace, did you not?

A. If it affected the operation of the first furnace.

Q. So that it was—it was a matter of saving money was that prompted you to ask the City that they allow your operations to shut down, isn't that the fact?

A. No, that is not exactly the case. There's—the government regulated the amount of ore you could consume, by keeping close touch with your inventories, your sales, and production, and you were only permitted to use—to purchase ore from the government, in accordance with your requirements.



(Testimony of J. W. Weitzenkorn.)

Q. All right. Was there any order issued curtailing your purchase of ore that had any connection with this shutdown?

A. We couldn't buy if our inventories built up, and our orders dropped off. We couldn't buy ore to run [223] willy-nilly. We couldn't obtain it. The whole scrap order was formulated to conserve ore supply.

Q. Do you—you requested the privilege of shutting down your second furnace. All your representations were to the effect that the market was depressed, so you couldn't compete with the other people, isn't that right?

A. We referred to the curtailment, due to the scrap situation, and later on, when we actually did shut down, we added to that the labor situation. We could not get sufficient labor to operate two furnaces.

Q. That was true generally in industries here in the Northwest, was it not?

A. That is right.

Q. Should that happen now, would you claim that it came under Section XIX?

A. Well, that is a hypothetical question, Mr. Carothers, and I could only answer it that way.

Q. There was no government order limiting your manpower, was there?

A. No, sir, but a situation existed here, that really controlled it. Manpower was under government control.

(Testimony of J. W. Weitzenkorn.)

The Court: What was the condition that gave rise to your resuming operations of this second furnace, in February of 1945?

The Witness: Well, we converted the—one of [224] the chrome furnaces over to make—enable us to make ferro silicon, another product.

The Court: And then you had one furnace producing one product—

The Witness: And another furnace producing another product.

The Court: And is that the situation now, or was it—

The Witness: That is the situation today.

The Court: And then this ferro silicon furnace hasn't been in operation since 1946—in November, or December?

The Witness: Well, I am not in sufficient touch with—

The Court: Oh, I don't think that is in dispute very much.

Mr. Carothers: I think that is all.

(Witness excused.)

The Court: Do you have any other witnesses, Mr. Metzger?

Mr. Metzger: Yes, I think one more witness.

The Court: Well, I'll have to warn you here—I don't want to tell you you've got to finish, but then this case is going to have to go over again; [225] and I dislike very much to try a case piecemeal, I have got—

Mr. Metzger: Well, I appreciate. My next witness will be very short, your Honor.

The Court: We will take a ten-minute recess.

(Recess.)

The Court: Now you may proceed, Mr. Metzger.

Mr. Metzger: Yes, your Honor. [226]

---

SAMUEL ARNOLD III

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, please?

A. Samuel Arnold, the Third.

Q. Samuel Arnold, the Third?

A. Third, right.

Q. Where do you live, Mr. Arnold?

A. Pittsburgh.

Q. And your profession?

A. I am a consulting engineer.

Q. In what lines?

A. Primarily electrical, specializing in electric furnaces.

Q. How long have you followed that profession?

A. Since 1916.

Q. What was your training therefor?

A. I was graduated from the Pennsylvania State College; I am a professional engineer, registered in Pennsylvania.

(Testimony of Samuel Arnold III.)

Q. Have you had much to do with electrical furnaces?

A. My experience has been rather wide. I have been consulting engineer for the United States Steel Corporation, [227] The American Bridge Company, and I have been more or less responsible for about seventy per cent of all the electric melting furnaces for ingot manufacturers in the United States and used in the United States.

Q. Now, has your experience in that connection brought you into connection with contracts for the supply of electrical energy for the operation of these furnaces? A. Frequently.

Q. In this case, Mr. Arnold, have you studied the contract between the Ohio Ferro-Alloys Corporation and the City of Tacoma, dated March 21st?

A. I have, and at length.

Q. For the purpose of reference, I hand you a copy of that contract, Exhibit 5. Now I would like to ask you a few questions. In Paragraph 10-(a) of the—yes, it's sub-paragraph (a), Section 10—the term "surplus power" is used here——

Mr. Carothers: Is this witness called as an expert?

Mr. Metzger: Yes, he is.

The Court: Well, let's hear the question, Mr.——

Mr. Metzger: Your Honor please, the purpose in calling this witness——

The Court: Let's proceed with your question, [228] Mr. Metzger.

Mr. Carothers: He has asked the question.

(Testimony of Samuel Arnold III.)

Mr. Metzger: I haven't finished it yet. I'll reframe it, so that it will be connected.

Q. In Section 10, paragraph (a) of this contract, there is the phrase: "The City will again supply the power referred to upon written request from the Corporation, only if and when in the City's judgment, surplus power is available in sufficient quantity." Now, to a person what does the term "surplus power" mean to the electrical profession, or the electrical trade, in that connection?

A. It usually means the amount of power available in excess of that required for contract obligations.

Q. So, if I understand you correctly here under this contract, if the City had, from its own generating sources, or else controlled a supply of power which was in excess of what the contract demands upon it called for, then it would have surplus power?

A. That would be my understanding.

Q. Well, under this contract it was the City's judgment as to whether that condition existed?

A. Well, under the terms of the contract, as I read it, that would be the case.

Q. Now, later on in that same paragraph, Mr. Arnold, there [229] is the phrase—it says: "If and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, and payments for the energy used will be made according to the pro-



(Testimony of Samuel Arnold III.)

visions of this contract." Now, Mr. Arnold, in your experience and in the electrical field, is it possible for there to be surplus power to the supplier and firm power to the taker?

A. If the supplier has surplus power and in their judgment, would agree to furnish that surplus power and make it on a firm power basis, then that would occur. In other words, it would be surplus power to the supplier, and it could be made firm power to the user, depending on the terms of the contract.

Q. Well, now surplus power, as you have defined it, as you have said it's used here, as long as it's surplus power, is it sold—is it remunerative or income producing power?

A. As long as it's surplus power and not sold, it doesn't bring anything into the supplier, of course; if they can dispose of that power, it's just that much to their advantage.

Q. Well, now that surplus power costs the supplier as much or less or what, compared to the ordinary—the power [230] required for the ordinary and regular departments?

A. Well, that is the same as on the incremental cost of the power; the surplus power in some cases, if it's water power, for instance, water going over the dam is not producing any energy. If it's going through the wheels, it's producing energy, and in that case the supplier would gain by disposing of that power, otherwise it would be simply wasted.

Q. I see. So what do you mean by the term "incremental costs"?

(Testimony of Samuel Arnold III.)

A. The cost of distributing and additional operations at the plant to produce that power.

Q. All the fixed charges and so on will have to be charged against the ordinary, regular supply of power, and not against the surplus power, is that right?

A. That's correct.

Q. Now, one more question, or two more questions. What is—in the last unnumbered paragraph of this sub-section (a), there is a phrase, "that the specified rate for this load"—what does the term "load" mean in electrical parlance?

A. "Load" in electrical terms means the quantity of energy, or block of energy, or in some cases it might mean the load on a bank of transformers. In this case, to me it means the same thing as the block of power—the load—— [231]

Q. Which block of power?

A. In this case, the second block of power.

Q. In this case, the second block of power. And in that same connection, reading this contract as an electrical engineer, of experience and training, it says just there: "and shall have made at least twelve consecutive monthly payments at the specified rate for this load"—what twelve consecutive monthly payments does that refer to?

A. Well, to me, it refers to the initial taking, for the reason that the initial taking was specified for a twelve-month period, to compensate for, you might say, turning on the power, to the cost of labor, and other costs of giving the customer that second block of power.

(Testimony of Samuel Arnold III.)

Q. So that as you see it, if you have made 12-month's payments at one time, you have satisfied the condition of having made at least 12 consecutive monthly payments? A. That is correct.

Q. Mr. Arnold, I would like to ask you a hypothetical question, based on this contract: If you assume that under this contract, the Ohio Ferro-Alloys Corporation commenced taking the first block, 6,500 kilowatts of power, in the summer of 1941, and commenced the taking of the second block in November of 1941, and continued the taking of both of those blocks until April, 1944; and then for the purposes of this question, dropped [232] temporarily the the taking of the second block, and subsequently with agreement of the City, resumed the taking thereof—that is of the second block, and again dropped that taking some eight, six, eight, or ten months later, less than—dropped it any period short of a year after the resumption of the second taking. In your opinion as an expert, what is the extent of the liability of Ohio in the way of paying for the second block of power under that resumed taking?

Mr. Carothers: Well, now I thought you here have the Court to interpret this contract——

The Court: That is strictly a question for the Court to determine. He may express his opinion. I say I consider it rather irrelevant, though, Mr. Metzger.

A. In my opinion, in accordance with this contract, and contracts of a similar type that I have

(Testimony of Samuel Arnold III.)

been familiar with, is that the contract once taken, and a payment made, that would be in the nature of a demand charge, based on a different type of contract, to compensate the City for the furnishing of that power. After the suspension of the first taking of that power—at the first taking and then suspension, and then second taking of power, the second taking, to me, would be on the basis of the amount of energy used—actual amount used. [233] Of course this being a demand type of contract, that would be on a monthly basis.

Q. Now, in this case, it would be measured by the time that that second block of power was taken, is that correct?      A. That's correct.

Mr. Metzger: You may cross-examine.

### Cross-Examination

By Mr. Carothers:

Q. Mr. Arnold, do you find anything in this contract that would indicate that if the Company resumes the taking of the second load that the contract demand would not again go back to 12,500, instead of 6,500?

A. I don't think that at all. If the initial block of power is being utilized and the second block of power taken——

Q. Yes.

A. ——the demand would then probably be in excess of the 12,500, because the demand might—the billing demand might be somewhat in excess of the contract demand.

(Testimony of Samuel Arnold III.)

Q. Well, the contract demand would go back up to—— A. 12,500.

Q. And that's what—as you will read that contract—that's what the Company is supposed to pay on, whenever they operate the second furnace along with the first [234] furnace, isn't that correct?

A. That's correct, but only for such length of time as they use it.

Q. Well, did you conceive that whenever two furnaces are operating, or are supposed to be operating, that the contract demand is 12,500, isn't that right?

A. The contract demand is 12,500 after the customer had notified you and you had agreed to give him the second block of power.

Q. Yes, and it wouldn't make any difference whether he only used a thousand kilowatts on the second furnace, they would pay for the 12,500, isn't that right?

A. That's right, until they notified you that they were no longer taking it.

Q. So that the clause of Section 10 that you referred to provides that if and when the second furnace is put back on, after the shutdown, that it would be on a firm power basis, does it not?

A. As far as the City is concerned.

Q. Oh, not as to the Company?

A. No, the Company, according to the contract, can notify you and not take the—give you thirty months, at least a thirty months—a thirty-day



(Testimony of Samuel Arnold III.)

written notice and drop that second block of power, according to my understanding. [235]

Q. The contract doesn't state that, but that's your interpretation of it, is that right?

A. I don't know what——

Mr. Metzger: The contract so states in its terms.

Q. ——it's my understanding in reading the contract——

Mr. Carothers: Does it not——

The Court: Address your objections to the Court.

Mr. Metzger: I beg your pardon, your Honor.

Q. The contract states that if the second furnace goes back on it would be on a firm power basis, and the power would be paid for in accordance with the terms of the contract, does it not?

A. Certainly.

Mr. Metzger: Object, if your Honor please. The question is improper, purporting to quote the contract and not doing so correctly.

The Court: The objection will be overruled.

The Witness: May I ask you to repeat that question?

Q. The contract provides that if the furnace—the second furnace is put back on after having been off, that it will be on a firm power basis, and that the power be paid for on—in accordance with the provisions of the [236] contract—or words to that effect?

A. That is what the contract says, yes, sir.

Q. Going back for a minute, then your idea is

(Testimony of Samuel Arnold III.)

that the City, under your interpretation of this contract, the City if and when it saw fit to permit the Company to come back on with its second furnace, would be obligated from there on out to the end of the contract to furnish them that power for the second block, isn't that right?

A. That's correct.

Q. That the Company could shut down any time it saw fit?

A. That's correct, but a thirty-day notice to——

Q. And then if the City let it come back on again, they could shut down whenever they wanted to.

A. That's correct, if they give a thirty days'——

Q. You appreciate the fact that this power is being sold to this Company on a \$17.50 annual rate, do you not?      A. On a kilowatt-year basis.

Q. On a kilowatt-year basis, is that right?

A. That's correct.

Q. So isn't it true that in construing what "firm power" means, that you must take into consideration the terms of the contract, the fact it is a kilowatt year, the rate, doesn't that enter into it?

A. That does enter into it, but it says right there that: "If and when the Corporation should drop its additional [237] 6,000 kilowatt requirements, either temporarily or permanently, and shall have made at least twelve consecutive monthly payments at the specified rate for this load, that the ratchet clause specified under that the billing demand will be dropped proportionately.

(Testimony of Samuel Arnold III.)

Q. Where do you find the rate for that load set up—for this load? You said “this load,” where is the rate for this load?

A. The rate for this load is the \$17.50 rate, for a kilowatt year.

Q. Is it provided for in Section 4——

A. That’s correct.

Q. ——(3-3)—— A. That’s correct.

A. That’s the rate for this load.

A. That’s correct.

Q. And will you turn to Section (b-3)?

Mr. Metzger: 4.

Mr. Carothers: 4.

Mr. Metzger: Section 4.

Mr. Carothers: Section 4, (b-3).

The Witness: Section 4, (b-3), I have it.

Q. So that is the rate that would be applied, any time they dropped the second furnace, isn’t that true? A. I would not—— [238]

Q. The rate set up in (b-3), that’s the rate that would be applied?

A. That rate would be applied any time the City would again see fit to give them the 6,000 kilowatts additional power.

Q. Well, Section (b-3) provides that if they saw fit to give the thirty-days notice, that they pay for a full year, does it not, immediately preceding, whether they had operated a full year or not?

A. Well, I would take that to be the initial taking.

(Testimony of Samuel Arnold III.)

Q. Well, now it didn't say that, does it?

A. It does not say that, but this other clause that I have just read to you, would certainly indicate that to me.

Q. Oh, but you find nothing in that clause that would indicate that at all, do you?

A. Well, which clause do you mean?

Q. (b-3). There is nothing to indicate that that rate applies to the first, second, or third time that the second furnace operates, is there?

A. It says that \$17.50 per net year per kilowatt of billing demand, as in (2) above, except that the continuous and uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be prorated.

Q. A full year's billing, that says, does it not?

A. That's correct. [239]

Q. It doesn't say the initial billing?

A. It does not.

Mr. Carothers: I think that's all.

### Redirect Examination

By Mr. Metzger:

Q. But subsection (a) of Paragraph 10, refers to at least twelve consecutive months' payments, does it not?      A. Correct.

Q. And in construing this contract, you have to give effect to all provisions in it, do you not?

A. That's correct.

Q. You can't single out one, and assize it to the disregard of another?

(Testimony of Samuel Arnold III.)

Mr. Carothers: Well, I object——

The Court: Well, I will sustain the objection to that question.

Q. Now, Mr. Arnold, under this contract, dealing with that same last clause that I was talking about, it refers to the ratchet—provides that the ratchet clause will be dropped proportionately. How was the proportion to be determined?

A. That means to me that the billing demand should be dropped proportionately; in other words, if the contract demand, totalizing 12,500 kilowatts, is exceeded, to—say 13,500 kilowatts, and after due notice from the [240] Company, the second block of power is dropped, the billing demand after that time, is to be  $65/125$ ths, it would be, or  $6500/12,500$ ths of the billing demand. In other words, that's what I understand the "ratchet" clause to mean, to drop in proportion.

Q. There would be nothing to base a proportion, unless upon the dropping of the second block of power, and the resumption of the taking thereof, the contract demand would drop from 12,500 to 6,500, is that not correct?

A. That's correct.

Q. In other words, in order for this last clause to be operative, it must be that upon a second dropping of the second block of power, the contract demand immediately drops to 6,500?

A. That is the contract demand——

Q. Contract demand?

A. ——drops to 6,500 and the billing demand would be in proportion.



(Testimony of Samuel Arnold III.)

Q. Drops down proportionately. And there is no provision—that changes the billing demand shall wait a full twelve months payment?

A. Not to my understanding. No.

Q. Providing that it shall be done immediately, whenever it is dropped.

A. That's entirely what gives me the understanding of the [241] whole situation.

Mr. Mezger: I see. That's all.

Mr. Carothers: That's all.

(Witness excused.)

---

### LOUIS H. B. ROBINSON

produced as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Carothers:

Q. State your name, please?

A. Louis H. B. Robinson.

Q. You are employed by the City of Tacoma, and have been for many years? A. Yes, sir.

Q. You are employed as a meter reader?

A. Yes, sir.

Mr. Carothers: Now these questions may be somewhat leading, your Honor, but I am hurrying them along.

(Testimony of Louis H. B. Robinson.)

Q. You have been acting in that capacity a good many years? A. Yes, sir.

Q. And did you—did you in the performance of your duties, [242] did you read the Ohio Ferro-Alloys Company's meter?

A. For about the past three years.

Q. Commencing when, do you remember?

A. Some time in 1944.

Q. And ever since then you have read it continuously, is that right?

A. There was three months when my partner just went out on the tideflats for experience.

Q. During the period in controversy you were reading it? A. Oh, yes, sir. Yes, sir!

Q. And you read that meter as I understand it, on the last day of the month as a rule?

A. That's true.

Q. Invariably, unless it fell on Sunday?

A. Yes, sir.

Q. The usual procedure was to go over, and there was a guard there, and did you have anything to prevent you from going in to read the meter?

A. Everything was locked, and I had to apply to the guard, and he would get me a pass written up and call for a man to read with me.

Q. And that would usually take about how long?

A. Usually about five minutes.

Q. Did that—during the time you were reading, did any change in the situation develop, as far as your being [243] able to get in to read the meter is concerned?

(Testimony of Louis H. B. Robinson.)

Mr. Metzger: I object, as immaterial and irrelevant, your Honor.

Mr. Carothers: It will be material before we finish.

The Court: He may answer.

A. Well, there was a very sudden change on December 31st in '45. They held me up about fifteen minutes.

Q. And what about January 31st in '46?

A. The same thing again.

Q. They held you up for how long a period of time?

A. Around fifteen minutes or so each time. I didn't keep exact track of it.

Mr. Carothers: All right.

Q. You read the meter as usual on those two occasions? A. Yes, sir.

Q. Handing you Defendant's identification A-4, those are copies of the original records of the meter readings and demand of the Ohio Company over a considerable number of months, including the period in question.

A. It covered three years, and I double-checked these copies myself today.

Mr. Carothers: All right.

Q. And those instruments contain the readings that you obtained on the various months in controversy here? [244] A. Yes, sir.

Q. Commencing with, including August, September, October, November, December, January and

(Testimony of Louis H. B. Robinson.)

February—that would be August '34 to February—August '45 to February '46, is that right?

A. Yes, sir, all of that and more.

Q. And in the reading of November 30, 1945, indicated what demand for the month of November?

A. Decimal 956 which was multiplied by 12,000, that means there was almost 12,000 kilowatts. The actual reading of the demand hand was decimal 956.

Q. For October?

A. No, November 30th. That's the reading I understood you to say.

The Court: How many kilowatts, did you say?

Mr. Carothers: Aren't you——

The Court: If they're not translated into——

The Witness: They're not translated into kilowatts. It's a multiplier, times 95.6% of 12,000. It's almost a full 12,000 load. Over 95% of 12,000.

Q. Aren't you confused? Isn't that the October reading?

A. October is .999. Over 10,000—nearly 12,000.

Q. The reading for both October and November approached close to 12,000?

A. Very close, just under. [245]

Q. And the reading for December, which you stated on the 31st of December, approached what?

A. That dropped to point 63.

Q. It would be about how many kilowatts?

A. Oh, it would be about——

(Testimony of Louis H. B. Robinson.)

Q. The maximum demand for that month?

A. Oh, we have got it figured up here, I can give you the exact figure.

Q. Okeh.

A. December 31, the actual load was 7,560.

Q. And for January 31st reading, in 1946?

A. That actual load was 7,404.

Mr. Metzger: That is on what?

The Witness: That is on the ledger.

Mr. Metzger: Go ahead. Was the meter read again on the 26th of February—February—is that right—1946? A. Yes, sir.

Q. And that demand showed what, for the month of February up to that time?

A. That dropped a way down to only one point 525.

Q. That would be about sixty three or four hundred or somewhere along there? Just under 6,500?

A. Just under 6,500, yes.

Q. In the first readings that you made which would indicate [246] that there was any load less than 10,000 was when?

Mr. Metzger: Your Honor, please, I object to this testimony. Counsel have supplied me with what purport to be the original records, and asked to substitute a copy. There is no such information on the original records handed me, as the witness is now testifying to.

The Court: Well, the witness is translating certain terms that he has there into kilowatt hours, I suppose, or kilowatts, isn't he?



(Testimony of Louis H. B. Robinson.)

Mr. Metzger: Yes, but he presumably has the figure on a copy which were taken off the original; there is no such a figure on the original.

Mr. Carothers: The meter reading is on the original.

The Witness: It is all right there. Look in the demand column. Maybe he isn't familiar with the meter card.

The Court: Proceed.

Mr. Metzger: Go ahead, I'll see if I can follow it.

Q. The first meter reading that you—wherein you would be able to discover the demand for any month had gone below 10,000, was when?

A. Below 10,000? [247]

Q. Yes.

The Witness: I have got to look at this.

A. You see, December 31st; well, to go back, the last amount over 10,000 was November 30th. Then December 31st, it dropped to 7,560, which was higher than they wanted it, and the men were very much worried about it.

Q. At that time when you read that meter on December 31st, did you have any conversation with anybody over there?

A. Well, the man I dealt with,—that was Mr. Farmer, he was quite concerned that it was higher than he had expected it to be, and he wanted it to be, because then he said they had dropped one furnace and they had expected it to be down to

(Testimony of Louis H. B. Robinson.)

the load that one furnace was supposed to draw. It was around a thousand too high.

Q. Yes.

A. So I told him that he had to admit there it was on our meter, and we both agreed that it read that. Well, I had never paid any attention to their meter, but I asked him what about their meter, what did it say, and he said that's the trouble, it's too high too, but he didn't say how much. That was December 31st.

Q. Well, you know the kind of meter the Company had, beside our meter?

A. That was just above it.

Q. And that was a meter—the face of it only showed a [248] matter of twelve or twenty-four hours record at one time, and then it rolled up and you couldn't see it any more? A. That's all.

Q. So that you had no way of determining by looking at the Company's recording meter, what demand that type of meter might have registered during the month, is that right?

A. Yes, sir, I never even looked at it, because there was no use.

Q. Of course, your demand arm, when once pushed up any time during the month, stays at that point until you turn it down, is that true?

A. Monthly demand.

Q. Yes. On their meter all you can see is what is on the face of it at the time you read the meter?

A. Four, five or six hours at one time.

Q. Now, when you went back to read the meter

(Testimony of Louis H. B. Robinson.)

on the 31st of January, did you have a conversation with anybody at that time?

A. Well, practically the same thing over again. I used kilowatts, instead of the actual decimals on the demand. The load was almost the same. It was 7,404.

Q. 7,404.

A. Well, he was quite perturbed that time because of it [249] being that high, and he had to agree it showed that. Well then it was that I first began to wake up that there was something up that I didn't know about.

Mr. Carothers: Well don't go into that yet, Mr.—

Q. Yes, what did you discover on that occasion, the 31st of January?

A. Well, this particular kind of meter, each time I would get through reading it, I'd break the seal on the demand hand, and there is a little wire trigger there that I turned around and put the hand back to zero. This time, for the first time,—

Mr. Metzger: Which is this time, Mr. Robinson?

The Witness: January 31st—this is a very particular date, because this is only one out of hundreds that I ever thought anything about.

Q. Go ahead.

A. The face of the meter was loose and sagging, so I couldn't reset the demand. Immediately I figured there was something wrong, and I just quit right there, I did nothing, let it stay as it was and reported it.

(Testimony of Louis H. B. Robinson.)

Mr. Carothers: That's all.

The Court: Proceed with the cross-examination.

Mr. Metzger: Yes, your Honor. [250].

### Cross-Examination

By Mr. Metzger:

Q. Mr. Robinson, you say that you have been reading the Ohio meters since 1944, with the exception of about three months.

A. Three months in the middle of the summer of last year.

Q. You are reading them now; I mean that's part of your assignment? A. Yes, sir.

Q. You read them last month?

A. Yes, sir.

Q. Now, you say that when you went down there at the end of each month to read the meter, you would break the seal to reset the City's demand indicator?

A. After they are all agreed that everything is all right, and agree on the reading.

Q. You agree on the reading.

A. Agree on the reading first, and then the last thing before I leave, I reset it.

Q. Well, with whom did you agree on any reading for October 1st, 1945?

A. I haven't any idea what his name was.

Q. You don't know?

A. I talked with three or four different men. They never told me what their names was. [251]

Q. You don't know any of their names?

(Testimony of Louis H. B. Robinson.)

A. No, I remember Mr. Farmer and then, his name is Mr. Pritz, a young man that testified this morning.

Q. Pritz—P-r-i-t-z.

A. Pritz, yes. I remember those two by name, but the others I didn't know their names. In fact the man, right now, I don't know his name.

Q. On October 31, 1945, with whom did you agree?

A. Well, whatever man was on duty, I don't know his name.

Q. You don't know. On November 30th, with who did you agree?

A. Up to the time Mr. Farmer came back, there was a man there, but I have lost track of his name now. I knew it at the time, but I don't remember it now.

Q. On December 31st, with whom did you agree?

A. Mr. Farmer.

Q. He agreed with you, that your reading was correct, is that it?      A. Yes, sir.

Q. Huh?      A. Yes, sir.

Q. On January 31st, he agreed with that, too, did he?      A. Well, every time he agreed.

Q. Every time he agreed?

A. Well, we couldn't quit until we did agree.

Q. And he told you, when you were down there on December 31st, 1945, and again on January 31st, 1946, that the Company had dropped down to a one-furnace operation?

A. He explained that was why he expected the demand to drop. That was the first I heard of it.



(Testimony of Louis H. B. Robinson.)

Q. And he told you that on both occasions, both December and January? A. Yes, sir.

Q. And that—he told you that he couldn't understand any such demand, that it couldn't be—that something must be wrong, didn't he?

A. That's what he thought.

Q. That the Company was down to a one-furnace operation, and that it couldn't go over 6,500?

A. Well, he was very much worried about it—it being so high, but I told him I couldn't help it.

Mr. Metzger: That's all.

### Redirect Examination

By Mr. Carothers:

Q. Mr. Robinson, by agreeing—that when you say you and the Ohio Company man agreed, you mean that you agreed as to the meter reading of the City's meter?

A. That was the position of the City's meter card.

Q. You called him over and you both looked at it and you [253] agreed that was the proper reading? A. We both wrote down the same figure.

Q. You didn't mean to say you tried to agree that whatever figures they might have there, would agree with yours?

A. I never looked at their's.

Mr. Carothers: That is all.

Mr. Metzger: Mr. Robinson, just one question.

(Testimony of Louis H. B. Robinson.)

Recross-Examination

By Mr. Metzger:

Q. You never can tell from the end of the month when or how the City's demand meter got up to the point it then indicates, can you?

A. There isn't a thing to go by unless somebody watched it constantly every day.

Q. When you get down there at the end of the month you find it at a certain place, and you take it or leave it?

A. That's the way it works.

Mr. Metzger: That's all.

(Witness excused.)

The Court: Have you offered these copies?

Mr. Carothers: No, I will at this time.

The Court: Any objection, Mr. Metzger?

Mr. Metzger: I think not, your Honor. [254]

The Court: They will be admitted in evidence.

(Whereupon meter readings referred to were then received in evidence and marked Defendant's Exhibit A-4.) [255]

---

LEONARD J. AVRILL

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

(Testimony of Leonard J. Avrill.)

Direct Examination

By Mr. Carothers:

Q. Your name is what?

A. Leonard J. Avrill.

Q. And you are employed by the City of Tacoma for many years?      A. Yes, sir.

Q. In the meter department?      A. Yes, sir.

Q. Repairing and overhauling meters?

A. That is right.

Q. In testing meters, inspecting meters, and so forth.      A. That's right.

Q. How long have you been there now?

A. Almost ten years.

Q. And did you have experience prior to that time in meter work?      A. Yes, sir.

Q. Did you have occasion in connection with your duties to visit the Ohio Ferro-Alloys plant on the tideflats?      A. Yes.

Q. It was said this morning—early in the day, that you were there on the 31st of December, 1945, is that correct? [256]

A. I was not there on December 31, 1945.

Q. You did go there, when?

A. I was there several times.

Q. Well, following December?

A. After that?

Q. Yes. When was the first visit to the Company after that?

A. January 10th, 1946, if I remember correctly.

(Testimony of Leonard J. Avrill.)

Q. Was there any information brought to you about any trouble over there on the 3rd of January?

A. The 3rd of January?

Q. Yes.

A. I don't remember just that date. It might have been on the third. It was recorded there some place, I don't remember or recall just off hand what it was.

Q. Well, do you have your work notes with you as to when you went over there?

A. Yes. I recall now, it was on January 3, 1946 that I was asked to test the synchronizing of our meter with the Ferro-Alloys meter.

Mr. Metzger: And that date, sir?

The Witness: January 3rd, 1946.

Q. And you and who else did it?

A. It was just myself and—you mean my partner?

Q. Yes.

A. Just myself and my partner. [257]

Q. And what was his name?

A. Ed Parker.

Q. Then on the 10th, you—I believe you said you went there on the 10th of January?

A. Yes, I was there on the 10th.

Q. In response to some instructions or complaint, or what?

A. I was there on January 10th, in regards to a test on the register, complained by one of the fellows at the Ferro-Alloys about the demand being too high; and upon coming at the plant and

(Testimony of Leonard J. Avrill.)

setting up for a check on that demand register, I found that all the four seals, on the duplex meter was broken and had been replaced to look like they had not been tampered with.

Q. That's the four seals on our meter that had been broken?

A. Our City meter, yes sir.

Q. We produced in Court here a meter. Is that the identical meter that was at the Ohio Company at the time you were there?

A. It is.

Q. And continued to be there until what date? Or did you have anything to do with taking it out?

A. I didn't have anything to do with reclaiming the meter.

Q. You were there on the 10th of January, 1946?

A. I was.

Q. And this meter was there? [258]

A. And that meter was there.

Mr. Carothers: We didn't repair it; we just brought it here for inspection, so the Court could get some idea.

The Court: I would like the witness to step down and show where these seals are?

Q. Will you just point out to the Court the four seals that you found broken?

A. Do you see it—right in each corner here, here and here.

The Court: What is the purpose of them?

The Witness: The purpose of the seals is to seal



(Testimony of Leonard J. Avrill.)

the cover on so that the cover cannot be removed, unless the seal is broken. The only means where the meter can be entered into these seals have to be broken. All four seals have to be broken.

The Court: Do they have to be broken every month, do they, if you are making your reading by the month, so that you can set your meter back?

The Witness: No, that is done by this re-set arm here only that we set the demand pointer.

The Court: Well, those seals cover that—is there a glass cover on that?

The Witness: This is a glass cover. A square, rectangular, square cover.

The Court: Well, what I am trying to get at, [259] does the glass have to be taken out so that the meter can be set?

The Witness: No, no. This reset arm here, resets the demand pointer on the demand gauge.

The Court: I see.

The Witness: This pulls out here after the seal is broken——

The Court: I see.

The Witness: This pulls out here after the seal is broken——

The Court: I see.

The Witness: ——and then you can reset the demand back to zero.

The Court: I see.

Mr. Carothers: The resetting device is sealed also, is that right?

The Witness: That is also sealed.

(Testimony of Leonard J. Avrill.)

Q. But the meter reader, under no conditions, is to break these seals.

Mr. Metzger: I object to that, your Honor, please.

Q. For the purpose of reading the meters.

A. No, he would not. The only seal the reader would break is on the reset arm in the middle of the meter.

Mr. Metzger: You mean that is the only seal [260] he would have to break?

The Witness: Yes.

Q. And those four seals were broken and pushed back when you were there on the 10th?

A. Yes, that was discovered when I went to break the seals to take the cover off the meter. I found all four of them had been broken and replaced.

Q. Now, did you have anything to do with the testing of this meter at any time?

A. No, I did not test that meter at the time this came up.

Q. Did you make a test of this meter on January 3rd or an examination without opening it up?

A. I made an examination without opening up the meter on the synchronizing reset with the Ferro-Alloys meter. It was just an external test, not having anything to do with getting into the meter at all.

Q. Did you find at that time that there was a discrepancy between the City meter and the Company meter?

(Testimony of Leonard J. Avrill.)

A. It was such a small discrepancy of a few seconds that it was agreed upon by Mr. Pritz there at the plant at that time that that was satisfactory.

Q. Did you make any test at all on the Company's meter at any time?

A. Yes, on March the 1st, 1946, I tested the Alloys' recording watt hour demand meter. [261]

Q. Well, what did you find in respect to that?

A. I found that their meter, that is the graphic or recording watt hour demand meter was 7.2% fast on 10% load and on a full load, which would be a 100% load, it would be about 3.3 and 4/10 per cent fast.

Q. Well, now referring to your notes again, did you make any test back on the 3rd of January, other than what you have already referred to, of the Alloys' meter?

A. On the 3rd of January—well, nothing outside of a little small synchronism check was all, with our meter and their meter. No electrical tests, or watt hour test at all, just a synchronizing check.

Mr. Carothers: That's all.

#### Cross-Examination

By Mr. Metzger:

Q. Mr. Avrill, as I understand it, you say you were only down at the Ohio's plant, according to your records, on January 3rd and January 10th. and then again on March 4, 1946, is that correct?

A. On January 3rd, January 10th, and I was also there on February the 28th, and March the 1st, and also March 4th.

(Testimony of Leonard J. Avrill.)

Q. February—the 28th of February?

A. The 28th of February.

Q. The 28th of February. And the only time that you testified [262] as to doing anything with the—you made this slight synchronization test on January 3rd, is that right?

A. On January 3rd, I made a synchronizing check on——

Q. Check—that's simply a timing to see that the two meters are working in time with the other?

A. Just a timing check of the synchronism of two reset arms on the meter.

Q. So that when each one is talking about the same half hour demand, is that the point of that, sir?

A. That's right.

Q. And on the—March 4th you made a test of the Company's recording demand meter?

A. No, that was on March 1st, I tested the Alloys'——

Q. That's March 1st.

A. The Alloys' meter.

Q. All right. Now you say you found it to be fast?

A. Yes.

Q. That is in recording more kilowatt hours than were actually being used?

A. That's right.

Q. You say you were not down there on December 31, 1945?

A. No, I was not down there at that date.

Mr. Metzger: Your Honor please, I don't like to excuse this witness entirely. I have sent to the plant for certain information and I think it will be here [263] in a very few minutes.

(Testimony of Leonard J. Avrill.)

The Court: Are you through with the present cross-examination?

Mr. Metzger: For the present, I am through.

The Court: You may step down then, and remain in the Court Room.

Mr. Metzger: Just a moment, if your Honor please.

Q. Mr. Avrill, did you make any record of the demand indicated by the City's demand meter on January 3rd? A. I do not believe I did.

Q. Did you make any record of what the City's demand meter registered on January 10th?

A. Yes, I have a reading here of the demand on January 10, 1946, of 0.6225 less times 12,000—

Q. Give me the figure over again?

A. .6225.

Q. .6225? A. Times 12,000.

Q. And as far as you know, that's the same reading as it was on January 3rd?

Mr. Carothers: That is the date you are asking about.

Mr. Metzger: No, I am asking about January 10th, he's talking about now. [264]

A. Yes, it is.

Q. As far as you know, these were the same on both days?

A. Well, as far as I know, I couldn't say. I don't know.

Q. Well, you don't know if there was any change in that time? A. I couldn't say.



(Testimony of Sam Klaben.)

A. Yes, I found it 0.6115, which would give about 7,338 kilowatts.

Q. Did you have occasion to go to the plant again?

A. Yes, I guess after the cover was repaired—or damaged and repaired—I went back to check the meter again, to see whether it—she was in good calibration. [267]

Q. And that was when?

A. That was February 18th, 1946.

Q. And what was the condition of the meter at that time?      A. The meter was in good shape.

Q. You had to do with testing this meter later on when it was taken out?

A. When it was reclaimed and brought to the shop?

Q. Yes.      A. Well, the shop man tested it.

Q. When was that, do you know?

A. Well, it was about 3-4-46.

Q. March 4, '46?

A. Yes, that's when the meter and the service wasn't reclaimed from the——

Mr. Carothers: That's all.

### Cross-Examination

By Mr. Metzger:

Q. So, on the 4th of March, '46, the meter was taken out?      A. Yes, sir.

Q. And a different meter was installed by the City?      A. Yes, sir.

(Testimony of Sam Klaben.)

Q. A different type of meter?

A. Yes, sir. [268]

Q. Is that right?

A. That's correct.

Q. All you did was on January 17th, you made—I don't know—some kind of a test of the City meter?

A. Well, that was a complete test, I had to—it took quite a little while and I changed the bearings, oiled and serviced the main gasket and everything checked out okeh.

Q. Did you have to break the seals to get into that?

A. Oh, yes. Yes, sir.

Q. Take it all apart?

A. That's right.

Q. Well, when had similar tests like that been made previously do you know, do you have any record?

A. No, I have no record of that.

Q. Has the City got any record of it?

A. The City has a record.

Q. But you didn't check up to see—compare the results of your test and the City's previous test of a similar character?

A. No, sir.

Q. These readings in decimals like you get down, 0.6115—two readers can read a difference of two or three-tenths on the reading quite easily without either one being accused of scullduggery, can't they?

A. Yes, it has always been a practice of the meter readers [269] and the meter men to always read with the benefit toward the customer on demands in kilowatts.

(Testimony of Sam Klaben.)

Q. And your reading of .6115 was with that idea in view?      A. That's right.

Mr. Metzger: That's all.

### Redirect Examination

By Mr. Carothers:

Q. This meter, when it was reclaimed, a different meter was installed and it was put in a different place, is that right?      A. That's right.

Q. Placed at the outside of the plant?

A. Yes, sir.

Q. Was that the 4th of March that that was done?      A. Yes, sir, the 4th of March.

Mr. Carothers: That's all.

(Witness excused.) [270]

---

### ROBERT McQUARRIE

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Carothers:

Q. State your name, please?

A. Robert McQuarrie.

Q. Robert McQuarrie, how do you spell that?

A. M-c-Q-u-a-r-r-i-e.

Q. And you're an employee of the City of Tacoma, Mr. McQuarrie?      A. Yes, sir.

(Testimony of Sam Klaben.)

Q. And have been for many years?

A. Since 1927.

Q. And in what capacity?

A. In the Meter Department.

Q. As what—repairman—inspector——

A. Repair man and testing and installing.

Q. And you have had many years' experience before that?

A. I had five years before that. About 25 altogether.

Q. Have you had occasion to visit the Ohio Company's plant here, in this controversy here?

A. Yes, sir. Around—I think it was around about February—the 1st of February of '46, there was a complaint slip [271] came in that the case was damaged, they couldn't reset the demand and then they sent me down for the repair, so I took——

Mr. Metzger: I object, your Honor please, as wholly immaterial and irrelevant, there is nothing in issue as of that date.

Mr. Carothers: We expect to show that this meter cover, in addition to the seals that had been broken on the 10th, had been tampered with on the 31st.

The Court: Of course, I don't know that it would make very much difference in the final outcome.

Mr. Carothers: I don't either, your Honor.

The Court: But I'll let him testify briefly.

Q. In what condition did you find it?

(Testimony of Robert McQuarrie.)

A. Well, I found that the front part of—the square part of the glass was separated from the ribs of the meter.

Q. Well, this box is just a——

A. Yes, that's just for carrying it around.

Q. Well, you step down and point out to the Court the condition the box was in.

A. Well, this here front—this glass was separated from the glass ribs here; it was quite loose, you could shove it, and that's why you couldn't set the demand.

Q. Well, how was it attached in the first place to these?

A. Oh, these here thumb nuts—wing nuts tighten that and [272] hold it in place.

Q. Is there any sealing—or cemented?

A. Yes, it is generally sealed right around here, the first place we have to look after.

Q. Then the cover is cemented onto the sides?

A. To the ribs, yes.

Q. When you went over, was the cement broken all around?

A. Yes, all around. You could move this with your hand in different directions.

Q. And did that leave any space that you could insert any kind of an instrument or anything into?

A. It would be possible to put a piece of wire in between the ribs and this front.

Q. Now, this box, of course, shouldn't be removed?

A. That shouldn't be on that. We just put that on there.



(Testimony of Robert McQuarrie.)

Q. The cement was broken all around—did you ever have that happen to any other meter?

A. No, not to my knowledge.

Q. In your opinion, how could that happen?

A. Well, I don't know, I'm not prepared to say——

Mr. Metzger: I object, your Honor——

The Court: I believe I sustain the objection. It would be only a guess, unless——

Q. And you repaired the meter, its condition?

A. I took the glass and the cover off and put a cloth over [273] it, and took it over to Fuller's. They were the only people that we could get that could repair that type case, but we took a reading of the kilowatt hours and the demand hand before we left. We always do that every time we come in contact with a meter.

Q. Then how long were you gone?

A. Oh, about three or four hours. They said it would take quite awhile.

Q. And when you returned, what did you discover as to the meter reading—the demand?

A. Well, we found the hand had went up a little from the original demand that we found there.

Q. Did you make a notation of it?

A. Oh, yes. And then I figured that possibly my cloth had touched that demand, so I put it back to its original reading, and put the cover back on again.

Q. Did you have anything to do with machine when it was taken out in January or March?

(Testimony of Robert McQuarrie.)

A. No. Mr. Foote, the man who does the inside work, he tested that.

Q. Did you have anything to do with installing the replacement over at the plant?

A. No, I didn't.

Q. Who did that?

A. I think Ralph Thomas did that. [274]

Q. When a meter of this type—by the way, what kind of a meter is that, so that the Court——

A. Well, that's what they call a duplex meter. At that time, I think that was in there because we had two circuits—two power lines come in there. I think that's the idea there.

Q. Well, is that the usual meter that is used for——

A. That's—we consider that one of the best types made in the United States today.

Q. And if a meter is out of adjustment, what usually happens to it?

A. Well, in what way?

Mr. Metzger: Your Honor please, this is speculative what usually happens to it.

The Court: I don't see the purpose of all this testimony. I don't see the purpose of any of this now, Mr. Carothers. We are not trying this case on whether meters——

Mr. Carothers: The only question is——

The Court: ——are in or out of order.

Mr. Carothers: The only way it would be material at all, is the question of whether the Court is going to accept our meter readings or those of the

(Testimony of Robert McQuarrie.)

Company's, if it gets down to where there's—the ratchet clause is applicable. It's the only, actually—— [275]

The Court: Well, I haven't been trying to take a listing of the evidence with that issue in mind at all; and if it does become a question why we can give it consideration later. This question—this case isn't turning on—now upon meter readings, only incidentally.

Mr. Carothers: My only thought, your Honor, is that the Plaintiff dealt considerably on that question, witness after witness.

The Court: The issues are made by this rather incomplete and almost a defective pre-trial order, as a result of a pre-trial conference. If I could have had the information that I have had here the last two days, I would have compelled you to have narrowed the issues down specifically to what they are; but now, as it is made up, they are, as I mentioned this morning again; first, they call for a situation that arose in connection with this abrogation of the service, or this discontinuance of the service; and second, as to when, if ever, a notice was given, if a notice was an effective notice, so as to what refund would go to the City; and third, a finding or a declaration as to what rights the plaintiff might have should they desire to go back on the service. And so we are dwelling an awful lot upon incidental matters as to whether someone representing the Company, or some vandal broke into a meter, and all of those things I'm [276] not going

(Testimony of Robert McQuarrie.)

to work on this late, on this case. I'll just have to put it off for probably three weeks.

Mr. Carothers: That is all.

### Cross-Examination

By Mr. Metzger:

Q. Mr. McQuarrie, is that it? A. Yes, sir.

Q. When was it you say you found the front part of this glass loose?

A. Around February the 1st.

Q. February the 1st?

A. Around the 1st of the month, I think it was, yes.

Mr. Carothers: What year?

The Witness: 1946. We could get that from Fullers quite easily, the exact date.

Mr. Metzger: That's all.

Mr. Carothers: That's all.

(Witness excused.) [277]

---

### VERNE KENT

produced as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

By Mr. Carothers:

Q. Your name is Verne Kent?

A. That's right.

(Testimony of Verne Kent.)

Q. And you've been employed by the City for some twenty odd years?      A. That's right.

Q. What period were you Superintendent for the Light Department? Well, it was a number of years prior to 1944 and up to June '45, isn't that correct?      A. That's right.

Q. So you were superintendent during this squabble?      A. That is right.

Q. And as such, you took part in the negotiations of this contract?      A. That's right.

Mr. Carothers: Now, your Honor, I might say that the purpose of this testimony is just to refute Mr. O'Neil's declarations in this deposition position, and if the Court——

The Court: The Court will permit you to [278] lead him some, and that's why I consider that very material and together with these letters, and if this witness' testimony tends to throw any light on that issue, as to whether there was a mutual and voluntary modification of the contract, the written contract.

Mr. Carothers: Well, now I am speaking first of the negotiations. I gather from the Court's remarks that he is not interested in what took place leading up to the negotiation of this contract. Now he is disregarding the testimony of the plaintiff's witness in that regard, and so I——

The Court: Well, I am going to make that sweeping a statement.

Mr. Carothers: I am assuming the attitude of the Court.



(Testimony of Verne Kent.)

Q. Mr. Kent, you were still Superintendent in 1945—no, April 1944, when there was a suspension in the operation of the second furnace over a period commencing some time about the 26th of April, 1944, and going to to February, 1945, isn't that right?

A. I'm not sure of the dates but along in there.

Q. And that suspension came about as a result of a mutual understanding, which lead to writing in the form of letters and maybe one telegram, which has been introduced [279] here in evidence, is that right?

A. I don't know whether the letters have been introduced or not? I haven't—

Q. But you're familiar with the letters that took place? A. That's right. With Mr. Cole.

Q. And one of those letters is dated the—

Mr. Metzger: Our first letter was March 29, 1944.

Q. March 29th letter where you disagreed with him as to Article XIX, where it says it is to the mutual advantage of both parties and that each party reserves his right to shut down and be put back on in thirty days, et cetera.

A. That's correct.

Q. Who framed that letter?

A. Well, I wrote it.

Q. It was signed by Commissioner O'Neil?

A. That's right.

Q. All the negotiations and arrangements leading up to that were handled by you, is that correct?

(Testimony of Verne Kent.)

A. Yes, between myself and Mr. Cole of the Ohio Ferro-Alloys Company.

Q. As far as you can recall, did Commissioner O'Neil take any part in that at all?

A. No, I don't believe he did.

Q. That was after he had been defeated for office, was it not? [280]

A. Well, I'm not sure of that. Maybe it was. I haven't checked those dates.

Q. Now, in connection with the correspondance, the exchange of correspondence at that time, was there any oral conferences of any kind, with Ohio's representatives?

A. In regard to this shutdown?

Q. Yes, yes.

A. There were several discussions with Mr. Cole, who was then local manager; and I believe there was a telegram to Mr. Cunningham or something, on the proposition—or a telephone conversation, I don't recall which.

Q. But those discussions were with you?

A. That's right.

Q. And Mr. Cole?                      A. That's right.

Q. Mr. Cole.                      A. That's right.

Q. And perhaps, Mr. Boyle sat in on one of those——

A. Yes, sir. Mr. Boyle was in on it.

Q. And was there anything special, outside of what was put on paper, that has to do with this shutdown?

A. No, the whole idea was, if possible, was to

(Testimony of Verne Kent.)

give advance permission, as it were, to come back on—they could come back on, that's what they were interested in—if they were to shut down, whether or not the City would [281] agree to take them back on; and that was the purpose of that letter to say that we would agree to it, outside of the contract, if that was possible—if possibly it could be done.

Q. And in the correspondence each side saved their rights?

A. I think it was so stated in the letter, wasn't it?

Mr. Carothers: I think that is all.

The Court: Is this your handwriting, or a photographic copy of your handwriting on this Plaintiff's Exhibit 8. A notation on the bottom of it?

The Witness: This isn't my writing, no.

Mr. Metzger: I think that was put on in the East, your Honor.

The Court: Oh.

Mr. Metzger: It's taken from—the explanation for it is contained in another letter, which is in evidence. I would admit that was indorsed in the East.

The Court: Very well.

Mr. Carothers: I don't know if the Court understands this rachet clause arrangement.

The Court: None too well.

Q. Mr. Kent, will you explain to the Court, the rachet clause that is applicable to this case?

A. Well, the rachet clause—my understanding

(Testimony of Verne Kent.)

of it, is that this demand hand is pushed up by a point, and [282] it—the same as a ratchet on a spring or anything else—the hand will not come back unless it is reset manually. And the contract provides that the contract demand—or the actual demand, as recorded by the meter will determine the billing demand, whichever is the highest. So that ratchet clause refers to this hand going up and not going back at all, and the billing is determined on the highest setting of that hand throughout the whole year, while it's stilled and reset each month, on the monthly reading to equalize to the highest demand at the end of the year under the contract.

The Court: Well, when did this ratchet provision of the contract come into effect, on this contract? Did you make use of it at all, at any time on the first load, the 65,000? Was the ratchet provision of the contract——

The Witness: The ratchet provision is that the demand stays up and doesn't come down at all under the contract, for the whole year.

Mr. Carothers: On the first furnace?

The first furnace or the second furnace also.

Q. Now, but you didn't get the Court's question. As far as the ratchet clause on the first furnace, that has no application at all, because they have to pay through the [283] ten years.

A. That's right on the last demand, it doesn't apply.

Q. All right, now as to the second one, that is what the Court is concerned with.

(Testimony of Verne Kent.)

A. Well, now as to the second one, it doesn't apply there either, if the second furnace operates over a year, or for two years, and so forth. It is only when it shuts down—shuts down and those months in excess of a year are prorated. Then the ratchet clause is ineffective so you can prorate that.

Q. On an annual basis; in other words——

A. On an annual basis.

Q. In other words, if you ran three months beyond the twelve-month period, whether it is the first, second, or third time that the furnace is operated, for that three months, the ratchet clause would apply. A. That's right.

Q. The highest billing demand, the highest actual demand, is what you would charge him for, is that right?

A. Well, for the twelve months and for the three months, you would take—that would be at the seventeen fifty a kilowatt year rate, but you would prorate that and only charge him for three months, or \$1.46, I believe it figures, about 46c per kilowatt per month. Those three months would be prorated; and in order to do that under [284] the contract, you have to drop this ratchet clause.

The Court: Well, let me ask you this, and see if I can clarify this in my own mind. This second furnace was entitled to 6,000 kilowatts of energy, and they assumed that obligation to pay for that.

The Witness: That's right.

The Court: ——and the City had the obligation of furnishing it——



(Testimony of Verne Kent.)

The Witness: That's right.

The Court: Even though they might only use half of it, or might shut down half the time.

The Witness: That's right.

The Court: But the City was compelled to stand ready to serve 6,000.

The Witness: That's right.

The Court: And so the minimum charge made under the contract in the first year was at least 6,000. Is that right?

The Witness: On the second block.

The Court: On the second block, yes, let's forget the first one.

The Witness: That's right.

The Court: But suppose that some month in that first year, they went to 7,000 on the second block. Did that fix the rate for the whole year, or for a month?

The Witness: For the whole year.

The Court: But that still didn't involve the ratchet clause, or did it?

The Witness: No, it doesn't involve the ratchet clause.

The Court: It's not involved there.

The Witness: No, except for the hand is a ratchet device.

The Court: Yes, but if the contract had gone straight through, this one, and there had been no shutdown, would there ever have been any occasion to invoke what you call the ratchet clause?

The Witness: No, no there wouldn't.

(Testimony of Verne Kent.)

The Court: If, on the other hand, the contract had been suspended, either by reason of its provisions, or by mutual consent, and then resumed, where would the ratchet clause have gone into effect on this?

The Witness: Well, they would be permitted under the contract to drop the second block, which may have been the 6,000 or 7,000, which the demand shows that, so that the ratchet clause would come into effect to put it back to the original contract demand of 6,500 kilowatts.

The Court: Well, that was being used all the time, or being charged all the time.

The Witness: That's right, that's right, but it's all on the same meter, all recorded on the same meter.

The Court: For both furnaces?

The Witness: That's right.

The Court: I see. That rather clears it up for me.

Mr. Metzger: Your Honor, please, I think you have one or two of the exhibits there, I would like to interrogate the witness about.

### Cross-Examination

By Mr. Metzger:

Q. Mr. Kent, showing you Exhibit 8, is that the letter of which you claim to be the author, although signed by Mr. O'Neil? A. Yes, that's correct.

Q. Well now, I don't have a copy of it, but in that letter you first said that you wouldn't agree

(Testimony of Verne Kent.)

with the Company's contention that they were excused from operating the second furnace under Article IX of the contract, is that right?

A. IX or XIX, I don't remember.

Q. XIX, yes. [287] A. That is right.

Q. Then you said, "However, the situation here—the power situation is critical. The City is being compelled to buy large blocks of power, and it will be to the City's advantage to let you shut down.

A. That's correct.

Q. And that was the fact?

A. That was the fact.

Q. And the shutdown was to the City's advantage?

A. About \$900 a month, as I recall.

Q. All right, and you were very glad to be relieved temporarily of the obligation of furnishing the power for the second block?

A. That's correct.

Q. And you were—but you reserved the right to compel them to go back on again whenever you wanted them to. A. That's right.

Q. And they had the right to come back on whenever they wanted to? A. Yes.

Q. And this whole arrangement was intended to be outside of the contract as a special arrangement between the two parties?

A. That's correct.

Q. And was entered into on that basis and that was your [288] understanding of it?

A. That is correct.

(Testimony of Verne Kent.)

Q. And at the same time when you made it, you weren't saying to Ohio if you accept this you have got to give up your claim under Article XIX. You said they could preserve their right under Article XIX.

A. That is right. I don't know whether I said that, but I had no objection to it.

Q. I mean, that was the understanding?

A. Yes.

Q. And then, Mr. Kent, I show you another letter, a subsequent letter of April the 11th. Are you also the author of that letter, although it is signed by Mr. O'Neil?

A. Well, I am not sure about this letter, whether I wrote that or not.

Q. Well, it is not particularly material. You are not sure whether you wrote that letter or not?

A. No.

Q. But you have read it now, but that letter is in accordance with your understanding and it confirms your previous letter of March 29th, does it not?

A. I think so.

Q. And so far as the City is concerned, when the Ohio did shut down on or about April 26th, they were shutting [289] down under this special arrangement that you had proposed and O'Neil had signed in the letter of March 29th.

A. Yes.

Q. That's right? A. That's right.

Q. And neither side was to be in any way penalized by that shutdown?

A. I believe that is correct.

(Testimony of Verne Kent.)

Q. That is correct, too.

A. That is correct.

Q. It was to be wholly outside of the contract?

A. That is right.

Q. That's right, and so for the purposes of the contract then, it was just the same as though Ohio's taking of the second block of power had been continuous, and that shutdown not count?

A. Well, I wouldn't say that.

Q. Well, that is the effect of your statement, isn't it?

A. No, I don't believe so. I don't agree on that.

The Court: Now why don't you agree with it?

The Witness: Well, this was just an agreement to shut down outside of the contract, without agreeing to what the contract meant, and giving them permission—advance permission, if it was permissible, to allow them [290] to come back on again. That's all we were trying to do.

Q. There was a shutdown outside the contract for the mutual advantage of both parties?

A. That's right, for the mutual advantage of both parties.

The Court: Well you, representing the City, did you mean to say that they could avail themselves of the provisions of Article XIX of the contract, where a condition arose that was beyond their power?

The Witness: Well, at the time this agreement was made they didn't know that they were ever coming back on.



(Testimony of Verne Kent.)

The Court: Well, some of this correspondence says specifically, whether it's a letter you dictated or somebody else, that you do not recognize a right to consider the situations enumerated in Section 19—of Article XIX of the contract, and you do not permit the cessation of service based on Article XIX.

The Witness: That's right.

The Court: Well now, you stated to Mr. Metzger that you still recognized the right of the Company to claim the benefits of Article XIX, in this——

The Witness: Well, I was looking at it from this angle, who am I to judge, but in my opinion the reason given didn't apply under Section 19.

The Court: You mean the reasons the Company had given.

The Witness: The reasons that the Company had for the shutdown.

The Court: Well, as a matter of fact, from your statement and the other testimony that has been given here, the City was actually short of power at the time?

The Witness: That's correct.

The Court: And the Company was actually long on power, because of conditions that had arisen that the City had nothing to do with.

The Witness: That is right.

The Court: And the parties concluded that it would be mutually advantageous to suspend the operations as to the second furnace?

The Witness: That's right.

(Testimony of Verne Kent.)

The Court: That is all, I just wanted to see if that was his views. Apparently it is more or less the view of both parties.

Mr. Metzger: That's all I have. Oh, one other question, Mr. Kent.

Q. As a matter of fact, since the inception of this contract, the City has never had occasion to, and never has, billed Ohio for any higher demand than the contract demand, [292] is that correct?

A. I couldn't state.

Q. As long as you were Superintendent of Light that was the case. A. I believe it was.

Q. Is that right?

A. Well, I couldn't definitely state, because I haven't the demand before me.

Q. Well, so far as you know, the ratchet clause never came into operation, and never has been put in operation? A. That is right.

Mr. Mezger: That's all.

The Court: Anything further, Mr. Carothers?

### Redirect Examination

By Mr. Carothers:

Q. You don't know whether it ever exceeded the 12,500 demand? A. No, I don't.

Mr. Carothers: That is all.

(Witness excused.)

The Court: Anything further, Mr. Carothers?

Mr. Carothers: The Court doesn't want to [293] hear any testimony regarding the negotiations lead-

ing up to this. We were going to call Mr. Jones that had to do with the drafting of the original contract, but I take it from the Court's remarks that the contract speaks for itself.

The Court: It generally does——

Mr. Carothers: We rest.

The Court: No, I don't care to hear further testimony as to the various steps that led to the contract.

Do you have any rebuttal, Mr. Metzger?

Mr. Metzger: Yes, we would like to have a short rebuttal to the City's testimony.

The Court: How many witnesses?

Mr. Metzger: I think one.

The Court: It is long past adjourning time. Of course if I adjourn this case I adjourn it for about a month. Now that is the situation, because I put it on my calendar as a day and a half case. I set other cases and my calendar is becoming involved.

Mr. Carothers: Your Honor, we would like to finish up, this evening.

The Court: I am afraid you won't be able to do that, but if you have got a short rebuttal on something, put them on right now. [294]

Mr. Metzger: Mr. Farmer, please.

### MARVIN FARMER

recalled as a witness on behalf of the Plaintiff, was examined and testified in Rebuttal as follows:

(Testimony of Marvin Farmer.)

Direct Examination

By Mr. Metzger:

Q. Well, Mr. Farmer, there has been some testimony here relative to the condition of the City's meter over at the plant, and the state of the seals and the glass cover on it. You heard the testimony here from the City's witnesses?

A. That is correct.

Q. That's the same type of meter or perhaps the same meter that the City installed over there?

A. That is correct.

Q. In '42, what was the condition of the seals on that meter, as to whether they were intact or had been broken?

A. Well, it seems to me like they was broken, and I am very sure that they was broken, at least part of the way around, due to vibration.

Q. In '42? A. Yes, sir. [295]

Q. Now, when you came back to the plant in—after war service, and you got back there later in December of 1945, then what was the condition of it?

A. It was very serious. It was broken all the way around.

Q. Broken all the way around on December 27th?

A. Yes, that is, the seals were broken.

Q. The seals were broken? A. Yes, sir.

Q. And what about the glass being separated or loose?

(Testimony of Marvin Farmer.)

A. Correction, the seals—I mean by the glued seal, as to air getting in, and not the company's seals that they put on with a stamp.

Q. When you talk about seals now, you are talking about—— A. The glued seal.

Q. The adhesive on the glass, from the front plate to the side plate? A. Yes, sir.

Q. And that was broken in December, 1945?

A. Yes, sir.

Q. How long did that condition obtain? Until the meter was replaced?

A. No, they repaired that meter some time in the early part of January, I believe, in that account, they repaired the glass.

Q. They repaired the glass, did they? [296]

A. Yes.

Q. Mr. McQuarrie said he repaired it on the first of February. Would that be about the right date? A. Approximately, yes.

Q. Now, where was that meter located?

A. On the panel board in the control room.

Q. Well, how close is that—how far above the ground,—the floor level?

A. Approximately three feet.

Q. Three feet. Was it subject to any—being jarred by any doors or otherwise?

A. Yes, the door would come into contact with it if it was slammed back hard.

Q. Now, who put—who installed the meter at that particular place?

A. That, sir, I do not know.



(Testimony of Marvin Farmer.)

Q. You don't know.

A. It was installed when I came to work.

Mr. Metzger: Do you admit the City installed that meter?

The Court: Oh, I assume they did. It isn't a matter of——

Mr. Metzger: All right, that is all. [297]

Cross-Examination

By Mr. Carothers:

Q. You didn't report the condition you found on these two occasions to the City, did you?

A. Which one was that?

Q. Well, either the loose frame or the seals being broken.

A. I wouldn't say whether I did or didn't because I don't know.

Q. Well, then you could say whether you remember whether you did or not, can't you?

A. I imagine I called it to the manager's attention. We talked about various things, a default every time we read the meters. I wouldn't say.

Q. You mean to say the meter man isn't telling the truth when he stated he discovered it for himself on the 31st of January?

A. No, I wouldn't say that he isn't telling the——

Q. Then you didn't report it to him?

A. Well, I won't say.

Q. And you didn't in the first part of January

(Testimony of Marvin Farmer.)

when you discovered the glass loose, you didn't report that to anybody, did you, either? I mean the seals broken?

A. I didn't discover it until after they called my attention to it.

The Court: Is that all, Mr. Carothers? [298]

Mr. Metzger: I would like to ask one other question.

### Redirect Examination

By Mr. Metzger:

Q. Mr. Farmer, Mr. Robinson when he was on the stand said that on January 31st—or December 31st, 1945, when he was at the plant, and he found a City's meter reading about 7500 kilowatts, and you told him that Ohio had dropped to one furnace—yes, one furnace operation, he said that you told him that Ohio's meter was too high, too. What is the fact, did you make any such statement?

A. Not to my knowledge.

Q. Well, what was the fact, did the Ohio's meter register too high at that time?

A. No, they hadn't in any of the periods that I inspected, which was throughout the whole month.

Q. Any statement you made to Mr. Robinson at that time was understood by him——

Mr. Carothers: Well, now, just a minute.

Q. (Continuing): ——to be—that Ohio's meter was too high——

The Court: I think I will have to sustain the objection, Mr. Metzger, to that. I don't see how he

(Testimony of Marvin Farmer.)

could attempt to say. I wanted to ask you this question: [299] You remember talking to Mr. Robinson, do you?

The Witness: On the 31st?

The Court: Of December.

The Witness: Of December, yes, sir.

The Court: Do you remember telling him that the second furnace was out, entirely?

The Witness: Yes, sir.

The Court: And that was, of course, your discussion as to the meter reading?

The Witness: Yes.

The Court: Had you ever told him that before?

The Witness: No, sir, I never came until the 27th of that month.

The Court: Of December?

The Witness: Yes, sir, back with the company.

The Court: But you didn't tell him then. You told him on the 31st?

The Witness: That was the day he arrived there.

The Court: When he read the meter?

The Witness: Yes, sir.

The Court: That's all. [300]

#### Recross-Examination

By Mr. Carothers:

Q. Were you instructed to tell the meter reader to——

Mr. Metzger: Object as immaterial and irrelevant, whether he was instructed or not.

The Court: Objection overruled.

(Testimony of Marvin Farmer.)

Q. —to instruct the meter reader you were shutting down the one furnace permanently by any of your superiors? Were you given any instructions along those lines?

Mr. Metzger: I further object. He has never said anything about permanently.

Mr. Carothers: I think it is material.

Q. Were you given any instruction to tell the meter reader that you were through operating the second furnace or anything to that effect?

A. We had talked about it.

Q. Well, now——

A. And that is—at that time was one of my responsibilities.

Q. To notify the City when you are going to shut down your second furnace?

A. I was more or less responsible in a certain extent to that responsibility, yes.

Q. You didn't tell Mr. Robinson, though, to notify the Commissioner or the Superintendent, or anybody else that the Ohio Company was not going to operate the second [301] furnace any more, did you?

A. No, sir.

Mr. Carothers: That is all.

Mr. Metzger: That is all.

(Witness excused.)

The Court: Is that all the rebuttal, Mr. Metzger?

Mr. Metzger: Yes, sir.

The Court: Mr. Carothers, you stated the other day and I suppose your situation is still the same,

that you will cease to be official Corporation Counsel for the City after tomorrow?

Mr. Carothers: Tomorrow is my last day. Mr. Boyle will take care of it, I think. I would like to argue the case, your Honor.

The Court: Well, I would really like to have an argument on both sides at some later date. It's too late to attempt it this evening. Everybody is tired and worn out.

I might set this down for some time—it will be at least two weeks, unless my calendar on Friday should blow up. That hasn't been the history for the last three weeks of these calendars. [302]

Mr. Metzger: Your Honor please, I hate to be a continual pest and nuisance about these assignments. When last Thursday you announced that the argument of the P.U.D. case against Longview Fibre would be continued to May—Tuesday, May 20th, to my mind at that point was wool gathering. Personally May 20th is an undesirable date, and I do not expect to be in the city for that time. Now I could take it up——

The Court: You take it up with counsel on the other side and get a stipulation, either approved by a letter informally or a formal.

Now on this case I think while the facts are fresh in the Court's mind, and in the minds of counsel, I see my calendar for Friday—I have four or five cases set, but apparently only two habeas corpus cases will be heard, so that I can hear this at 2:00 o'clock on Friday.



Mr. Boyle: Your Honor, it has just occurred to me that Mr. Carothers out of the case, that I have a conference with some railroad attorneys that has been postponed once, and it is set for next Friday.

The Court: Well, while this matter is fresh, and I have got a place I want to make a disposition of it, and railroad attorneys will certainly understand a matter of this significance that is in court, and they will have [303] to further continue their conference if you are an essential part of it, Mr. Boyle.

Mr. Boyle: Do you think we can dispose of it in the morning and be through in the morning?

The Court: I think we can.

Mr. Metzger: I understood it was 2:00 o'clock in the afternoon.

The Court: No, the Clerk just advised me that these habeas corpus cases are at 2:00 o'clock in the afternoon, and the argument should not require over 45 minutes on a side.

I might help you somewhat in argument by pointing out to you briefly what the Court considers is the central theme of this whole story, and that is:

First, as to whether there was an actual suspension under the terms and provisions of this contract, or whether there was a temporary suspension by reason of a mutual understanding between the interested parties, and I am inclined to the view that it was a temporary suspension, followed by a resumption. I mention these things so it will aid you in preparing your argument.

Then when the resumption occurred, if the Court should ultimately find that, whatever the liabilities

and rights of the respective parties were for a discontinuance, [304] they must be found in the contract, and brings us to the question of the notice, where they proposed to relieve themselves from liability.

And then the notice that is given here, and followed, not within 30 days or at the end of 30 days with a suspension of use, but a continued use through the months.

Now what was the situation. When was, if ever, a notice given in accordance with the terms of the contract? That's what I want you to give consideration to,—the first time, and the only thing we have in this record, though both parties do know a great deal more about the other than probably the cold record shows, but there was an open and shut statement made on December 31st that the—that this furnace is not running.

Now, then, with those—those are the things I want you to center on. Of course, if there was a complete suspension of operations with no thought of a resumption when conditions confronting the two parties changed, then we have for determination this question of 12 months of continuous service when a resumption took place, and a charge for 6000 kw's. at least. I am not much inclined to that position right now, but I don't want to make up my mind upon the matter too much, [305] but if I were to decide the case now, and this going quite a long ways, but it might help you in shortening your argument and a lot of labor that would be lost later,—if I were compelled to decide the case immediately,

or you were to submit it to me, and I were to make my decision, I would decide that the contract entered into in 1941 for the second furnace was continuously in operation, except insofar its operations had been mutually suspended outside of the terms of the contract, until December 31st, 1941.

Mr. Metzger: December 31st, 1945.

The Court: '45, yes, and that largely disposes then, of course, what was paid. If anything was paid after that in January or in February it would be in the nature of a credit or a refund.

Then we have the other question left here, which is as to the rights of the plaintiff to resume his operation, and on that issue if I were deciding it now—though I am still open for persuasion and a change of opinion, I would hold that their status would be that that would have resulted had they formally by the 30-day notice suspended the operation and relieved themselves, and the only way they could get back would be by the terms of the contract, which was when the City saw fit in their own discretion, to let them come back. [306]

Now those are my present feelings.

Mr. Metzger: Thank you, your Honor, that is Friday morning?

The Court: Yes.

(Whereupon adjournment was taken.) [307]

[Title of District Court and Cause.]

## COURT'S ORAL DECISION

(May 2, 1947)

(Following Argument by Respective Counsel)

The Court: I think that I am prepared at this time to make a disposition of this cause, insofar as this Court is concerned. I am not going to endeavor to give a general summary of the background and the history of the situation that gave rise to this problem. It's fairly complete in the record and pre-trial order, together with admissions made during the course of the trial, eliminate many things that might have been issues upon which the Court would ordinarily be required to make a finding.

It is, it seems to me, appropriate to give some thought before attempting to apply the facts to the situation that did arise, to give some thought to the conditions that prevailed in 1941 when this contract was in contemplation and later executed, which was on the 21st [308] day of March, 1941.

By the very nature of the contract, it is evident that there were extremely extensive conversations had before a contract of this magnitude would be entered into. The City of Tacoma, of course, being a governmental agency, did not have the same high degree freedom in its actions that it would had it been a private corporation, and the contract would have to be drawn with a much greater degree of particularity in order to fully express the agreement of the parties. From what took place after

its execution, proceeding under its provisions, it's evident that the parties did not anticipate all the situations and conditions that would arise, and that is what has given rise to this lawsuit.

Now in 1941 when these steps were being taken, when the contract was executed, the federal government had engaged in its unusually extensive defense program. By December the 7th it was actually engaged in war. Congress passed the Second War Powers Act very soon thereafter and gave the Chief Executive probably the greatest powers ever conferred upon a President in the history of the United States. All manpower and all material wealth and all agencies of production came within the purview of those granted powers, and they were being exercised as the need required, through [309] what were called "directives," or orders of one kind or another. The parties when they executed this contract couldn't have had that situation in mind, although they might have anticipated that there would be some great change, and they undoubtedly—the plaintiff in this action undoubtedly looked to the government as its principal buyer, either directly or by reason of its activities in other fields. After December the 7th, the government had the power and exercised it, to direct almost everything in a material way, and it certainly made directives here that directly affected the products produced by this corporation.

If I were left to the position where I would have to make a determination as to whether this cessation of use of power from the second unit occurred



within the provisions of Article 19 of this contract I would be inclined to find that they did, but I feel that under the evidence as it has been submitted here, I do not need to do that, because clearly in this large exchange of correspondence and doubtless personal interviews, particularly as they are supported by the testimony of Mr. O'Neil who was then the elective head of this city light division of the government, and the then superintendent, Mr. Kent, a condition had arisen by reason of this war situation, and the tremendous [310] unprecedented demands for electrical energy that the city found itself in a position where it could not, without loss to itself, meet its obligations in supplying power. I think there was some testimony from some witness, or else in the deposition, that they had to go outside and buy power from the Bonneville Administration, but the Court takes judicial notice if the facts are not, I know that the rate fixed for Bonneville power is \$17.50 a kilowatt year. So, of course, buying power at that rate, and selling it and furnishing the facilities for carrying it to the unit where it was sold, couldn't be a profitable venture for the city. And the parties undoubtedly, both of them, found themselves in a difficult position where it was to the mutual advantage of both to suspend the operation of the provisions in the contract concerning the furnishing of the second block of power—an odd situation, but for reasons of their own, each of them were just as anxious as the other that this obligation, the city that the obligation to furnish power and the company the obligation to pay for

it, be suspended, because it meant a financial loss to both of them and whether it was technically within the power of the city commissioner and the superintendent of light to enter into such a special agreement or not, I feel is beside the question. It was an emergency situation and [311] clearly grew out of the war, and the various regulations that came about, and there was a mutual modification of this contract as evidenced by the letters and the oral transactions between the parties.

Now, having determined there was a mutual suspension of it, rather than an alteration resulting in a discontinuance, then we come to the question as to what the liabilities are, or what relief, if any, should be granted to the plaintiff herein.

It's true that the defendant city took the position that through all of their early negotiations, as far as the correspondence at least is concerned, that they were making no suspension under Section 19 of the contract, and the plaintiff took the position that they were seeking a suspension under that section. The suspension occurred, and it occurred independent of that by reason of mutual agreement of the parties, and thus resulted to that extent in a modification of this contract.

It is very evident that the city, when it had surplus power, it expected to sell this block of power again. It is likewise very evident that when the plaintiff, the Ohio company, had a market for their output they expected to utilize the machinery they had to operate their second unit, and that situation did occur along in [312] 1945, was it? Now

the resumption of that power was again in substantial measure outside the strictly formal provisions of this contract, but when it was resumed the defendant City took the position that it was a new beginning, and therefore there would have to be twelve continuous months of payment, whether there was twelve months' use or not. The Ohio Company, plaintiff took the position this was just a resumption following a temporary and mutual discontinuance, and the Court so finds. That being a fact, then we get to the more literal terms of this contract, if the Ohio Company expected to relieve itself, at any time following this resumption in February, 1945, it would have to comply with the provisions of the contract for such relief.

The evidence indicates that there was a considerable discussion between the parties throughout the summer, and as we get up into the latter part of 1945, the corporation, evidently with an idea of compliance with termination, sent this letter—I have forgotten the number of it so I shall not refer to it directly, in August, however, of 1945, saying that they expected to discontinue the use of power but not within 30 days from this date or any particular time. Notice was defective because it was uncertain. However, the Court will find it was sufficient to give some warning to the [313] City, and without attempting to detail the record as here made, matters began to reach a more or less critical point. The City continued to bill on its theory that there were twelve months during which the Ohio Company would have to pay the full six thousand. The Ohio

Company, after 30 days following their notice, did not shut the furnace down. Intermittently, they had it down and up, and that condition continued through—or at least up until November 24th, I think it was, 1945. No further notice was given, but protests were being made when billings occurred in—if I am correct, in October and November. They were ignored. There was some one letter gone back once and then they were ignored, and the billings continued and the payments were made, because they had to be made under the existing arrangement or there would be a forfeiture of the deposit that had been provided for and with the wisdom and good judgment in a contract of this magnitude when the contract was first entered into. At any rate,—and here is where the—while this is an action at law, it is nevertheless controlled substantially by the equitable situation as disclosed by the evidence, and the Court is put to the position of making a finding as to when the City actually had notice. Well, they had definite and complete notice by the end of December of 1945. True, the meter reader is not an official who [314] has discretionary powers in matters of this nature, but from what had occurred in the way of at least indirect notice to the City by the protests that were made month after month, and the inference that the Court draws and I think it's a logical one that the meter reader who was an employee of the city, reported to his superiors and it did reach those in authority, but they had taken the position that the twelve months, irrespective of what was done, must prevail, and the



Court has found that that was not the fact, but I shall find that by reason of all of the things that are disclosed by the record in this case, that the City was fully forewarned and that there was a sufficient compliance, or at least the City would be now estopped from denying a compliance on January 1, 1946, and that the payments that they collected for January and February for this second unit, were payments in excess of that which they were legally entitled to, and the plaintiff is entitled to a credit in the amount there involved.

Now, then, as to the other feature of this case, the declaratory judgment, it's my interpretation of this contract, growing out of the existing situation following its alteration concerning the second unit, that the company can only go back on the use of power when and if the City sees fit to put them on, under the provisions of [315] Section 10 of the contract, and I think it's the third paragraph—that is, that there is no compulsion now for the City, automatically, whenever the demand is made, to furnish power. They are relieved from that, unless they find themselves in a situation that the contract mentions, and see fit to negotiate for the sale of this second block of power. When such occurs, the plaintiff company will be in a position that they were at the beginning of the taking of this power. They go on not for a month or two months, but they go on as I interpret this contract, for a full period of twelve months; that the position that the city took concerning a new taking, for which they have been billing, and the obligations that they have asserted as



Company, after 30 days following their notice, did not shut the furnace down. Intermittently, they had it down and up, and that condition continued through—or at least up until November 24th, I think it was, 1945. No further notice was given, but protests were being made when billings occurred in—if I am correct, in October and November. They were ignored. There was some one letter gone back once and then they were ignored, and the billings continued and the payments were made, because they had to be made under the existing arrangement or there would be a forfeiture of the deposit that had been provided for and with the wisdom and good judgment in a contract of this magnitude when the contract was first entered into. At any rate,—and here is where the—while this is an action at law, it is nevertheless controlled substantially by the equitable situation as disclosed by the evidence, and the Court is put to the position of making a finding as to when the City actually had notice. Well, they had definite and complete notice by the end of December of 1945. True, the meter reader is not an official who [314] has discretionary powers in matters of this nature, but from what had occurred in the way of at least indirect notice to the City by the protests that were made month after month, and the inference that the Court draws and I think it's a logical one that the meter reader who was an employee of the city, reported to his superiors and it did reach those in authority, but they had taken the position that the twelve months, irrespective of what was done, must prevail, and the

Court has found that that was not the fact, but I shall find that by reason of all of the things that are disclosed by the record in this case, that the City was fully forewarned and that there was a sufficient compliance, or at least the City would be now estopped from denying a compliance on January 1, 1946, and that the payments that they collected for January and February for this second unit, were payments in excess of that which they were legally entitled to, and the plaintiff is entitled to a credit in the amount there involved.

Now, then, as to the other feature of this case, the declaratory judgment, it's my interpretation of this contract, growing out of the existing situation following its alteration concerning the second unit, that the company can only go back on the use of power when and if the City sees fit to put them on, under the provisions of [315] Section 10 of the contract, and I think it's the third paragraph—that is, that there is no compulsion now for the City, automatically, whenever the demand is made, to furnish power. They are relieved from that, unless they find themselves in a situation that the contract mentions, and see fit to negotiate for the sale of this second block of power. When such occurs, the plaintiff company will be in a position that they were at the beginning of the taking of this power. They go on not for a month or two months, but they go on as I interpret this contract, for a full period of twelve months; that the position that the city took concerning a new taking, for which they have been billing, and the obligations that they have asserted as

against the plaintiff to which the Court has granted relief, will now prevail; that the suspension that occurred on January 1, 1946, concerning the use of power for the second unit, is a suspension of such a nature that it now gives rise, whenever there is a mutual agreement between the parties, to a taking that presents the obligation of taking for twelve months on the contract rate.

Of course, I do not mean to imply at all that the city or company couldn't mutually agree to again modify or change the contract, but since I am called upon to interpret and construe the contract as to a [316] contingency that might arise, or a situation that might arise, that would be my construction of it.

Now I think I have covered everything that is involved here. If I haven't, why——

Mr. Boyle: I think, your Honor, there is just one question, and that is the actual demand occurring in the months of February and January, after the discontinuance. There is a discrepancy between the sixty-five hundred in the testimony, I think, up to seventy-five hundred.

The Court: I did not think that was an issue here; that that would be covered by your contract. Your contract—if the one unit had been the only one that went on, because I made a finding that there was only the one unit on, and the provisions of the contract covered that, and that doesn't mean that

the payment should be based on a 6500 kw., if there was one unit that was using more than that.

Now, if you mean that I should make a determination as between the readings of the different meters——

Mr. Boyle: That was an issue, I think, your Honor.

The Court: Well, I would hold in that regard that the readings on the City's meters would be controlling, and payment would have to be based and made upon [317] those meters. There is no showing here that those meters were defective, nor that they should be disregarded and the readings on the company's meters accepted. I think the Court almost has to take judicial notice of the fact that when a public service or semi-public service is furnished under a measuring system of any kind, the party who furnishes it seems to have the—be in the driver's seat.

Mr. Metzger: That's how they are, your Honor, I will grant you that.

The Court: I appreciate that sometimes in the reading of my own water and electric meter, and I shall make that finding.

Now you may submit your findings whenever it is convenient to the parties. I do not want to fix any definite time unless you feel that I should.

Mr. Metzger: No, I think we will be able to work out something.

The Court: And if you are in doubt as to what the Court found, the Court Reporter can get it out at the request of the parties.

Mr. Metzger: I would like to ask now for your Honor's decision to be written up. I am asking that the Court's decision be transcribed so we will have that.

The Court: Yes, it might save you some little [318] time in preparing the findings.

Mr. Metzger: Yes, your Honor.

### CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter. [319]



DEFENDANT'S EXHIBIT A-1

November 6th, 1945

Airmail

City of Tacoma,  
Department of Public Utilities,  
Light Division,  
Tacoma, Washington.

Gentlemen:

You will please take notice that in payment to you this date of the sum of \$18,247.26, being the amount charged for electric current furnished during the month of October, 1945, against the undersigned The Ohio Ferro-Alloys Corporation, under a certain power contract between said Company and the City of Tacoma is not paid voluntarily.

From the information which we have it appears to us that the charge made against our Company is not in accordance with the terms of the contract, but inasmuch as the City declines to proceed with the furnishing of power under the contract unless our Company accepts the City's interpretation of the contract, we have no option but to make payment under protest and with the distinct avow that the whole amount is not due to the City.

Very truly yours,

THE OHIO-FERRO ALLOYS  
CORPORATION,

/s/ L. G. PRITZ,

President.

LGP

EMR

[Endorsed]: Filed September 5, 1947.

## PLAINTIFF'S EXHIBIT No. 5

Contract Between City of Tacoma, Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation.

This Agreement, executed on March 21, 1941, between the City of Tacoma, Department of Public Utilities, Light Division, a municipal corporation in the State of Washington, hereinafter called "the City" and The Ohio Ferro-Alloys Corporation, a corporation existing under and by virtue of the laws of the State of Ohio, with its principal place of business in the City of Canton, Ohio, and authorized to do business in the State of Washington, hereinafter called "the Corporation".

## Witnesseth

Whereas, The City owns and operates an electric power system comprising both hydro and steam generation, with suitable standby interconnections, and is serving customers in Tacoma and its general vicinity in Pierce County, Washington, and

Whereas, the Corporation now intends to construct, operate and maintain a plant in Tacoma, at 3002 East Taylor Way, for the manufacture of electro-metallurgical products, and the Corporation has requested the City to supply the power required for the operation of such plant, and

Whereas, the City has determined that a sufficient quantity of power will be available through

Plaintiff's Exhibit No. 5—(Continued)

its own generating facilities, or through standby interconnections, for the performance of this contract, and

Whereas, all acts, things and conditions necessary under law and the Charter of the City of Tacoma have been duly done, performed and complied with to make this agreement the valid and binding obligation of the parties hereto;

Now, therefore, the parties hereto do mutually covenant and agree as follows:

1. Term of Contract: This contract shall continue in effect for ten (10) years from the date of its execution.

2. Construction of Plant: The Corporation agrees promptly upon the execution hereof to cause the construction at the above mentioned site of a plant to manufacture electro-metallurgical products of the electric furnace and such related materials as may be necessary or desirable for its processes or products. The manufacture of chlorine will not be permitted under this contract. The Corporation agrees that such construction shall begin at once and that it will be continued with diligence so that the plant shall be completed on or about July 31, 1941.

Upon completion the plant shall be capable of using 6,500 kilowatts or more of electricity. Should such construction fail to be promptly or diligently continued, the City shall have the right to cancel this contract upon thirty (30) days notice in writing to the Corporation, except the contract shall not

## Plaintiff's Exhibit No. 5—(Continued)

be cancelled if and while such construction is prevented, delayed or impeded by reason of injunction, strike, riot, invasion, fire, accident, acts of God or the public enemy, war in the United States, Governmental regulations, orders or proclamations, priorities, laws, mobs, rioters, transportation difficulties, or other causes beyond the control of the Corporation.

In the event of delay in construction due to any cause specified above, the Corporation agrees to resume construction and diligently continue the same to completion of said plant as soon as reasonably possible.

The Corporation shall give the City not less than thirty (30) days' advance notice in writing stating the anticipated date of the completion of said plant.

3. Sale and Delivery of Power: The City shall sell power to the Corporation, and the Corporation shall secure all its purchased power from the City as hereinafter provided. The Corporation may, at its option, generate by-product power, solely for its own use, but such generation shall in no way decrease the contract demand or the rate per year, both hereinafter provided for. The City shall deliver power to the Corporation and the Corporation shall pay for power in accordance with the following Contract Demands:

(a) The City shall deliver to the Corporation's property line, at a point mutually agreed upon, nominal 240 volt, three-phase, 60 cycle power for construction purposes, not to exceed 50 KVA. Upon

## Plaintiff's Exhibit No. 5—(Continued)

completion of construction this connection is to remain and will be used to secure a minimum of 15 kilowatts of emergency power for certain plant auxiliaries.

(b) From the date of initial delivery, as hereinafter defined, the City shall make available to the Corporation, at or near its property line, at least six thousand five hundred (6,500) kilowatts of firm power at nominal 13,600 volts, three-phase, 60 cycles, in addition to the emergency power referred to above. This 6,500 kilowatts of power shall be known as the contract demand. The City shall install sufficient capacity in its transformers, switches and lines, so that power inputs of 7,500 kilowatts may be taken by the Corporation without injury to the City's facilities. The City shall provide additional facilities, of ample capacity, for a second unit upon six month's written request from the Corporation giving adequate assurance that expansion is contemplated.

(c) The contract demand may be revised as hereinafter provided but in no case shall it be less than six thousand five hundred (6,500) kilowatts.

The date of "Initial delivery." is hereinafter defined as the date upon which the plant is completed and equipped to use six thousand five hundred (6,500) kilowatts of electric energy but it shall not be later than about July 31st, 1941 unless the construction of the Corporation's plant shall have been delayed, prevented, or impeded for any cause set out in Section 2 hereof, in which case the date of



## Plaintiff's Exhibit No. 5—(Continued)

initial delivery shall be postponed by the period of any delay so caused.

Upon six months written notice from the Corporation to the City, the City agrees to make available and to deliver one additional block of 6,000 kilowatts of power under the same rate, terms and general conditions, except as specifically stated to the contrary hereinafter, as for the initial contract demand.

#### 4. Rate to the Corporation:

(a) Power sold under this contract for construction and emergency purposes shall be billed to, and paid for by the Corporation at the City's regular published rates for General Power.

(b) All power, except that used for construction and emergency purposes, shall be billed to, and paid for by, the Corporation at the following rates:

(b-1) Power used under the initial contract demand of 6,500 kilowatts, during the first six (6) months starting up period, may be at the rate of two and eight-tenths (2.8) mills per kilowatt hour except that a minimum monthly charge of sixty-seven (67) cents per kilowatt (fifty cents per horsepower) of indicated demand shall apply or, at the Corporation's option, at the rate of seventeen and one-half dollars (17.50) net per year per kilowatt of billing demand.

(b-2) Power used under the initial contract demand of 6,500 kilowatts, after the first six (6) months starting up period, and for the duration of

## Plaintiff's Exhibit No. 5—(Continued)

this contract, shall be at the rate of seventeen and one-half dollars (\$17.50) net per year per kilowatt of billing demand.

(b-3 The additional 6,000 kilowatts, if and when used for the second furnace as referred to elsewhere in this contract shall be at the rate of seventeen and one-half dollars (\$17.50) net per year per kilowatt of billing demand, as in (2) above, except that the continuous and uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be prorated.

## 5. Minimum Charges:

(a) The minimum monthly charges for power sold under this contract for construction and emergency purposes shall be as specified in the City's regular published rates for General Power (67¢ per kilowatt).

(b) The net minimum monthly charge for power, other than that used for construction and emergency purposes, shall be one-twelfth ( $1/12$ th) of seventeen and one-half dollars (17.50) net per year per kilowatt of billing demand, except as otherwise provided for under "Rate to the Corporation."

6. Contract Demand: The 6,500 kilowatts of power that the City is obligated to deliver under this contract shall be known as the contract demand. Delivery of power in excess of the contract demand, either with or without the consent of the City, ex-

## Plaintiff's Exhibit No. 5—(Continued)

cept as specifically provided for herein, shall not obligate the City, to make future deliveries of power in excess of the contract demand.

7. Billing Demand: The billing demand shall be the contract demand or the actual thirty (30) minute integrated demand as determined in the following paragraph, whichever is higher; provided, however, that the billing demand for any month shall not be less than the highest actual demand which occurred during the immediately preceding eleven (11) months, except as specified to the contrary under "Alteration or Cancellation of Contract Demand."

8. Power Factor: Whenever power is delivered to the Corporation at a weighted monthly average power factor of .825 or more, the actual demand for the month shall be defined as the average kilowatt delivery during the thirty (30) minute interval in which the consumption of energy is the greatest during the month. Whenever such monthly weighted average power factor is less than .825, then the actual demand shall be determined by taking .825 of the average kilowatt delivery for the thirty (30) minute interval in which the consumption of energy is greatest during the month, and dividing this amount by the weighted monthly average power factor. However, the City shall not be obligated under the terms of this schedule to deliver power to the Corporation at any time at a power factor below .80

The Corporation will make diligent efforts to improve this power factor to at least .85, if, as and

## Plaintiff's Exhibit No. 5—(Continued)

when improvements in furnace design and/or diversification of production make it feasible to do so.

9. Billing: Bills shall be rendered monthly and payments shall be due on the tenth (10th) day of each month, at the City Treasurer's office, for the previous month's power purchases. If the tenth day be on a Sunday or on a holiday, the payments may be made on the next business day. For the nominal 13,600 volt power, bills will be rendered monthly on the basis of one-twelfth ( $1/12$ th) of the annual rate. Adjustments to exactly \$17.50 per kilowatt year will be made at the end of December on the basis of the highest billing demand prevailing for that calendar year, except as specified to the contrary under "Rate to the Corporation" and "Alteration or Cancellation of Contract Demand."

Failure to receive a bill shall not release the Corporation from liability for payment. If payment is not made on or before the close of business on the due date, the City may, at any time thereafter, and after giving ten (10) days notice in writing, discontinue service until all past due bills are paid. Discontinuance of service, as herein provided, shall not relieve the Corporation of its liability for the agreed monthly payment during the period of time service is so discontinued.

10. Alteration or Cancellation of Contract Demand:

(a) For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts.

## Plaintiff's Exhibit No. 5—(Continued)

The Corporation will be permitted on six (6) months written notice, at any time during the life of this contract, to increase its contract demand to supply one additional furnace using not to exceed six thousand (6,000) kilowatts of power. If, following the date of initial delivery of this additional block of power, conditions in the Corporation's business are depressed so that the Corporation, in its judgment, cannot use the additional power contracted for, the Corporation shall have the right, upon giving the City at least one (1) month's notice in writing, to drop this additional power, whereupon the payment shall be according to the rates previously specified herein.

In the event the Corporation elects to exercise its right of alteration, as provided for in this contract, and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City's judgment, surplus power is available in sufficient quantity to meet the Corporation's additional requirements. If and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, to be altered downward only by the Corporation, upon at least one (1) month's written notice to the City, whereupon payments for the energy used shall be made according to the provisions of this contract.

The Corporation may permanently drop its addi-



## Plaintiff's Exhibit No. 5—(Continued)

tional 6,000 kilowatt power requirements, at any time, after one year's billing (12 consecutive months) at the specified rate. In the event the Corporation exercises this right of option, and the City is so notified in writing, the City may reclaim or salvage its equipment originally installed to serve the second furnace and its additional power requirements.

If and when the Corporation should drop its additional 6,000 kilowatt requirements, either temporarily or permanently, and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load, the "ratchet" clause specified under "Billing Demand" will be dropped proportionately.

(b) For the initial contract demand of six thousand five hundred (6,500) kilowatts.

If conditions arise which make the continuance of the Corporation's venture in Tacoma unprofitable, the Corporation shall have the right to cancel this contract provided, however, its similar ventures west of the Rocky Mountains, if any, are completely discontinued and the Corporation withdraws from that business west of the Rocky Mountains. In no event shall such cancellation take effect until at least four (4) years after the date of initial delivery. Any such cancellations shall be preceded by six (6) months' written notice to the City.

(c) For the nominal 13,600 volt power in general:

Should the City's generating and/or transmission equipment and/or facilities be temporarily damaged

## Plaintiff's Exhibit No. 5—(Continued)

so that it will be impossible to supply the domestic and essential public service, the City may request and the Corporation will reduce its load until the emergency is passed. Billing will be prorated to cover the idle time.

11. Escrow Fund: On the tenth (10) day of the first full calendar month subsequent to the date of initial delivery and on the tenth (10th) day of each month thereafter, until a total of forty-eight (48) payments shall have been made, the Corporation shall pay to the Treasurer of the City of Tacoma, sums of money equal to the number of kilowatts of the contract demand (minimum 6,500 kilowatts) for that month multiplied by twenty-nine and one-sixth (29-1/6th) cents. If the tenth day be on a Sunday or a holiday, the payment may be made on the next business day.

Such sums of money, whether in the original form of cash or after investment, plus any earnings from such investments thereof, shall be known as the Escrow Fund.

When, in the opinion of the Treasurer of the City of Tacoma, there are sufficient funds on hand, the sums of money so paid into the Escrow Fund shall be judiciously invested and reinvested by the Treasurer in securities of the United States or of the State of Washington. Provided, however, that the Treasurer may make investments in the following securities when the Corporation shall have designated that investments may be made in any of such securities, to wit: General Obligation Bonds of the

## Plaintiff's Exhibit No. 5—(Continued)

City of Tacoma, securities of the Electric Generating and Water Systems of the City of Tacoma, Port of Tacoma Bonds, Tacoma School District No. 10 Bonds, and Pierce County Bonds. Any earnings from investments shall be similarly invested and shall be added to the Escrow Fund.

Neither the city, the City of Tacoma or its Treasurer shall be liable for any loss which may occur as a result of the investment of funds as herein provided.

The moneys in said Escrow Fund shall be kept and maintained by the Treasurer at all times in a separate fund in the City Treasury and the securities physically separate and apart from the securities of the City of Tacoma. All costs of such Escrow Fund shall be borne by the Escrow Fund. The City of Tacoma shall be responsible for the conduct and actions of its officials in the handling of such Escrow Fund.

If this contract should be terminated permanently by the Corporation under any of the provisions hereof, at any time prior to the end of the seventh year after the date of initial delivery, the entire Escrow Fund shall be delivered to the City.

If this contract is not terminated permanently at any time prior to the end of the seventh year after the date of initial delivery, as aforesaid, the Escrow Fund shall be delivered to the Corporation as follows:

(a) Twenty-five per cent (25%) thereof at the end of the seventh year after the date of initial delivery.

Plaintiff's Exhibit No. 5—(Continued)

(b) Twenty-five per cent (25%) thereof at the end of the eighth year after the date of initial delivery.

(c) Twenty-five per cent (25%) thereof at the end of the ninth year after the date of initial delivery.

(d) The remaining twenty-five per cent (25%) thereof at the end of the tenth year after the date of initial delivery.

Provided, however, if this contract is terminated by the Corporation permanently under any of the provisions hereof at any time after the end of the seventh year from the date of initial delivery and prior to the end of the tenth year after the date of initial delivery, the entire Escrow Fund as it exists on the date of such permanent termination shall be delivered to the City.

Total or partial distribution of the Escrow Fund in accordance with the provisions of this Paragraph 11 shall not be deemed to affect any of the liabilities of the Corporation to the City except its liability to pay for power after the exercise of the right of permanent termination in the manner set forth in this contract.

Distributions from said Escrow Fund shall be in kind, figured at the market value at the time of distribution.

12. Termination of Contract: Unless otherwise expressly agreed in writing any termination or cancellation of this contract shall not affect any lia-

## Plaintiff's Exhibit No. 5—(Continued)

bility for payment for power made available or for money due on or before the date of which termination becomes effective.

13. Phase, Frequency, Voltage and Metering: The electric power supplied by the City shall be three phase, alternating current at a frequency of approximately 60 cycles per second and at nominal 13,600 volts. Delivery and metering of such power shall be at a point agreed upon by the parties hereto in the vicinity of the site of the Corporation's plant as described above. In the event the point of delivery is located on the property of the Corporation, the Corporation agrees to give the City a suitable easement on such property for the construction, operation and maintenance of the City's appurtenant power and metering facilities. The Corporation, at its own expense, shall provide suitable facilities for the transformation and transmission of power between the point of delivery and the point of use.

14. Measurement of Demand, Energy and Power Factor: The City shall, without charge to the Corporation, furnish, install and maintain the necessary meters for measuring the amount of power furnished to the Corporation. Should these meters fail, the amount of power delivered will be estimated by the City from the best information available, and such estimate shall, for billing purposes, have the same force and effect as an exact meter reading.



## Plaintiff's Exhibit No. 5—(Continued)

The demand meter shall register the maximum integrated kilowatt load during any thirty (30) consecutive minutes in the year.

15. **Meter Tests:** The City shall, not less frequently than once each year, make periodical tests and inspection of the metering equipment installed by it. At the request of the Corporation, the City shall make additional tests or inspections of such equipment in the presence of representatives of the Corporation. The cost of such additional tests shall be paid by the Corporation if the percentage of error is found to be less than 2% slow or fast.

In the event any test or inspection made by the City shows the metering equipment to be inaccurate by more than 2% slow or fast, an adjustment, based upon the inaccuracy found, shall be made in the Corporation's bills for service rendered since the beginning of the monthly billing period immediately preceding the monthly billing period during which the test or inspection was completed, or for the actual period of incorrect billing if such period can be definitely established, but in no case for a period exceeding three (3) months.

16. **Corporation's Lines and Equipment:** All lines, substations and other electrical facilities (except metering equipment installed by the City), located on the Corporation's side of the delivery point, shall be furnished, installed and maintained by the Corporation unless otherwise provided by this contract.

## Plaintiff's Exhibit No. 5—(Continued)

All lines and equipment must conform to applicable state and local regulations, and to accepted modern practice, as exemplified by the requirements of the National Electrical Safety Code, and the National Electric Code.

The City shall have the right, but shall not be obligated, to inspect the Corporation's electric installation at any time, and may reject any wiring or equipment that does not conform to the standards hereinbefore specified. But such inspection, or failure to inspect, or to reject, shall not render the City, its officers, agents, or employees, liable or responsible for any loss, damage, or accident resulting from defects in such electric installation, or for violation of the contract of which these terms and conditions are a part.

17. Responsibility for Property: All meters and other facilities furnished by the City shall be and remain the City's property, and the right to remove, replace, or repair such meters and other facilities is expressly reserved. Each party shall exercise due care to protect the other's property. In the event of loss or damage to either's property, caused by the other's negligence, the cost of necessary repairs or replacements shall be paid by the negligent party.

18. Right of Access: The City shall have access to the Corporation's premises at all reasonable times for the purpose of reading meters, and for testing, repairing, renewing, exchanging or removing any

## Plaintiff's Exhibit No. 5—(Continued)

or all equipment installed by the City and for the purpose of inspecting the Corporation's lines and equipment.

19. Interruption of Service for Causes Beyond Control of the Parties: If the operation of the City's generating or transmission system or the operation of the Corporation's work is suspended, interrupted or interfered with for any cause reasonably beyond its control, including, but not by way of limitation, the failure or breakdown of generating, transmission or utilization facilities or equipment, floods, fires, strikes, accidents, acts of God, or the public enemy, war in the United States, Governmental regulations, orders or proclamations, priorities, laws, mobs, rioters, transportation difficulties, or other causes beyond the control of the parties, the City need not deliver power hereunder and the Corporation need not accept or pay for such power for such period of time and to the extent that such suspension, interruption or interference makes it reasonably impractical to deliver or use such power and monthly bills for any period including any such suspension, interruption or interference shall be prorated.

Neither party, including its respective officers, agents, or employees, shall be liable to the other for damages or for breach of contract, in the event such suspension, interruption or interference, as outlined above, by way of example but not by way of limitation, does occur.

## Plaintiff's Exhibit No. 5—(Continued)

Each party shall promptly notify the other, in advance for predetermined suspensions, interruptions or interferences, and as soon as possible, in the case of unforeseen difficulties.

20. **Additional Loads:** Additions to, or material changes in the characteristics of the load, made without permission of the City, shall render the Corporation liable for any damage caused by such additions or changes.

21. **Voltage Fluctuations:** Electric service shall not be used in such a manner as to cause objectionable voltage fluctuations or other electrical disturbances on the City's system. The City may require the Corporation, at its own expense, to install such suitable apparatus as will reasonably limit fluctuations and disturbances when such fluctuations and disturbances are determined to be objectionable by the City.

The usual operating tolerances in the service voltages will be permitted.

22. **Balancing of Loads:** The Corporation shall, at all times, take and use power in such a manner that the load at the point of delivery will not be unbalanced between phases more than ten per cent (10%), except during periods subsequent to the changing of electrodes on the Corporation's furnace or furnaces, while new electrodes are "seating themselves," and during the periods required for tapping furnaces. In the event the three-phase load is unbalanced more than 10%, with the exceptions as aforesaid for the periods following the changing of

## Plaintiff's Exhibit No. 5—(Continued)

electrodes and the tapping of furnaces, the City reserves the right to require the Corporation, at the Corporation's expense to make the necessary changes to correct such conditions, or the City may, in its determination of billing demands assume that the load on each phase is equal to the greatest load on any phase.

23. General Provisions: Sale of power under this contract shall be subject to pertinent general provisions covering all sales of electricity by the City not in conflict with this contract. A copy of these General Provisions are attached hereto and form a part of this contract.

24. Purchase of Other Power: The Corporation shall secure all its purchased power from the City, providing, however, that the Corporation shall have the right to purchase from other sources such power as the City declares itself in writing as being unable or unwilling to furnish.

In the event the City declares itself as being unable or unwilling to furnish power, as aforesaid, the City agrees to cooperate in all ways reasonable and proper with the Corporation in getting such additional power or substitute power, such cooperation to include, if necessary, the granting of franchises or rights of way to other nearby utilities or Governmental agencies engaged in the sale of power.

25. Use and Resale of Power: The Corporation shall use all of the power purchased hereunder in its own operations to manufacture electro metallurgical or other products of the electric furnace, and



## Plaintiff's Exhibit No. 5—(Continued)

such related materials as may be necessary or desirable for its processes or products. The manufacture of chlorine will not be permitted under this contract.

None of the power purchased hereunder may be resold, nor shall the Corporation sell by-product power, if and when generated.

26. Substitution of Other Rate Schedule: If during the term of this contract the City sells power to a person or Corporation engaged in similar operations of a competitive character, under a schedule containing a lower rate for the district, class and quality of service covered by this contract, the City, within sixty (60) days after receipt from the Corporation of a written request therefore, shall thereupon make such schedule available to the Corporation as long as the same is used by such competing agency, and to the extent that the Corporation is using power hereunder in the manufacture of a product in competition with such competing agency, and shall submit to the Corporation a contract for the sale of power under such schedule containing such lower rate, to be substituted for this contract. The term of such substituted contract shall be the same as the unexpired term of this contract. The Corporation's Contract Demand under such substituted contract shall not be less than the Corporation's Contract Demand under this contract immediately prior to such substitution unless the City, in its discretion, determines that such Contract Demand, at the request of the Corporation, may be reduced without prejudice to the City.

## Plaintiff's Exhibit No. 5—(Continued)

27. Assignment: This agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto; provided, however, that neither this contract nor any interest therein shall be transferred or assigned by the Corporation without the written consent of the City.

28. Waiver of Default: No waiver by either party hereto of its rights with respect to any default of the other party hereto, or with respect to any other matter arising in connection with this contract, shall at any time be considered a waiver with respect to any subsequent default or matter.

29. Remedies Under Contract Not Exclusive: Nothing contained in this contract shall be construed in any manner to abridge, limit or deprive either party hereto of any means of enforcing any remedy, either at law or in equity, for the breach of any of the provisions hereof which it would otherwise have.

Either party hereto shall have the right of complete cancellation of this contract, except for obligations previously due, if and when any of the terms and conditions contained herein are violated by the other party.

30. Bankruptcy or Insolvency of the Corporation: If any proceeding in bankruptcy involving the Corporation, or any other proceeding based on the insolvency of the Corporation, or on its inability to pay its debts as they mature, shall be initiated, or if the Corporation shall make an assignment for the

## Plaintiff's Exhibit No. 5—(Continued)

benefit of its creditors, then the City shall have the right to terminate this contract at any time after giving thirty (30) days' notice of its intention so to do; provided, that if, within thirty (30) days after the sending of such notice, the Corporation shall give proof to the City of the dismissal of such proceedings or the effective revocation of such assignment, and shall pay all charges then due under this contract, then the right of the City to terminate this contract by reason of such proceedings or assignment shall cease.

31. Notices: Any notice or demand required under this contract shall be deemed properly given to the City if mailed, postage prepaid, to the City of Tacoma, Department of Public Utilities, Tacoma, Washington, or to the Corporation if mailed, postage prepaid, to Ohio Ferro-Alloys Corporation, Tacoma, Washington. The designation of the person to be so notified, or the address of such person, may be changed at any time and from time to time, by similar notice.

32. Odors: If, in the opinion of the City, the Corporation's plant should produce or emit obnoxious and objectionable odors, noticeable beyond a reasonable distance from the plant, the City may request and the Corporation shall correct the condition herein referred to.

In Witness Whereof, the parties hereto have executed this agreement in quadruplicate, the Corporation by the signatures and attest of its duly

Plaintiff's Exhibit No. 5—(Continued)  
authorized officers, as of the day and year first  
above written.

CITY OF TACOMA, for  
DEPARTMENT OF PUBLIC  
UTILITIES, LIGHT  
DIVISION,

By HARRY P. CAIN,  
Mayor.

Approved:

R. D. O'NEIL,  
Commissioner of Public  
Utilities.

Approved:

HOWARD CAROTHERS,  
Corporation Counsel.

Attest:

GENEVIEVE MARTIN,  
City Clerk.

Countersigned:

J. M. ROBERTS,  
Asst. City Controller.

OHIO FERRO-ALLOYS  
CORPORATION,

By L. G. PRITZ,  
President.

By H. G. PAISLEY,  
Secretary.

Approved:

ROBERT R. JONES.

Approved:

J. W. WEITZENKORN.

[Endorsed]: Filed U.S.C.C.A., Sept. 5, 1947.

LAINTIFF'S EXHIBIT No. 6

Exhibit 8. City of Tacoma, Department of Public  
Utilities, Tacoma, Washington

10-4-41.

Mr. J. W. Weitzenkorn  
Assistant to the President  
Ohio Ferro-Alloys Corporation,  
Tacoma, Washington

Dear Mr. Weitzenkorn:

We are returning herewith your copies of the long and short term contracts between the Electro Metallurgical Company and the Bonneville Power Administrator. After very careful comparison of all terms and conditions contained in these contracts with those now in effect in your contract with the City of Tacoma, we find that the Ohio Ferro-Alloys Corporation is in a very strong competitive position insofar as power is concerned.

It is our understanding that you are particularly concerned over the provision in your contract which calls for the payment of an escrow fund to the City of Tacoma to guarantee fulfillment of your contractual obligations, while, on the surface, it appears to you that the Electro Metallurgical contract with Bonneville is more liberally written in favor of your competitor. Perhaps you will recall that the escrow fund provision originally appeared in the contract tendered to you by Bonneville prior to your opening negotiations with the City. With this as a working basis, through give and take, we arrived at a mutually agreeable position, and a contract was signed with the City.



Although Bonneville still uses the escrow fund clause, when and where warranted, it was omitted in the Electro Metallurgical contract possibly because that company's Portland plant is sufficiently close to Bonneville's St. John substation to render negligible Bonneville's investment in additional power facilities installed solely for the company's use. In distinct contrast to Bonneville's negligible investment for the Electro Metallurgical Company, is the City's investment of about \$80,000.00 for the Ohio Ferro-Alloys Corporation.

That portion of your contract covering the initial demand of 6500 kilowatts, to which the escrow fund applies, permits cancellation, at your option, any time subsequent to the first four years during the life of the ten year contract. The corresponding "long term" twenty-year contract covering the Electro Metallurgical Company's initial demand permits the Company to temporarily curtail its contract demand, after the date of initial delivery, by an amount not to exceed in the aggregate 32,500 kilowatt years ( $5 \times 6500$ ) or at the most, for five years at 6500 kilowatts or demand. Thus, the Electro Metallurgical Company obligates and binds itself, regardless of business conditions, to pay for power for at least fifteen out of the twenty years, unless the Bonneville Administrator exercises his option, as provided for therein, to increase the rate for power above that prevailing at the date the contract was signed. It is interesting to note that no increase in the cost of power was contemplated or provided for in your contract with the City.

At your request the City granted an unusually low rate (2.8 mills) per kilowatt hour during the initial six months starting up period. Through this provision, not included in the Electro Metallurgical contract, you have already benefited to the extent of several thousand dollars. Again, at your request, we lowered the minimum power factory requirements from the 85 per cent required of the Electro Metallurgical Company, to 82.5 per cent. The City did not require you to build to its Tideflats Substation, but, instead, constructed a new substation for your benefit, adjacent to your property. This, in itself, is an appreciable item.

Concluding the comparison, that portion of your contract which covers the second block of power for the second furnace, to which the escrow fund does not apply, permits cancellation, at your option, any time subsequent to one year after the initial delivery of that second block of power. The corresponding "short term" contract covering the Electro Metallurgical Company's additional requirements, is strictly a two year agreement, with no way out for the Company in the event business conditions do not live up to expectations. The Company cannot exercise a right of cancellation, as you are privileged to do, and thus assumes two years of additional obligations over and above the fifteen year commitment provided for in the long term contract, all as contrasted to your privilege to unload at any time.

When all the facts in the case are fairly analyzed, we believe you will agree that your contract with the

City is so very liberally written from your point of view, that no further concessions can be expected. Most assuredly the City cannot agree to any further liberalization of its contract, or to the elimination of the escrow fund.

Respectfully yours,

/s/ R. D. O'NEIL,

Commissioner of Public  
Utilities.

rlw copy 1-8-46 (8)

rw copy 2/10/47 (6)

[Endorsed]: Filed U.S.C.C.A. Sept. 5, 1947.

---

[Endorsed]: No. 11727. United States Circuit Court of Appeals for the Ninth Circuit. The Ohio Ferro-Alloys Corporation, a Corporation, Appellant, vs. City of Tacoma, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed September 5, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11727

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation, vs. Appellant,  
CITY OF TACOMA, a Municipal Corporation,  
Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL

Comes now the appellant, The Ohio Ferro-Alloys Corporation, and as its Statement of Points on which it intends to rely on appeal, required by Paragraph VI of Rule 19 of the Rules of Practice of this Court, adopts the "Statement of Points on Which Appellant Intends to Rely," filed by appellant in the United States District Court for the Western District of Washington, Southern Division, on August 8th, 1947, and appearing at pages 87 and 88 in the transcript of the record, certified by the clerk of said district court.

/s/ R. M. RYBOLT,

/s/ F. D. METZGER.

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Appellant.

Service hereof by receipt of copy acknowledged  
this 29th day of August, 1947.

/s/CLARENCE M. BOYLE,

Attorney for Appellee.

[Endorsed]: Filed Sept. 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO RECORD TO BE  
PRINTED ON APPEAL

It Is Hereby Stipulated by the parties to the above appeal as follows:

I.

The parties hereby designate for printing the entire record on appeal as certified to the Clerk of this Court by the Clerk of the District Court of the Western District of Washington, Southern Division, together with the original exhibits transmitted to the Clerk of this Court, but with the exceptions hereinafter specifically set out.

II.

All titles, captions, jurats and verifications shall be omitted from the printed record on appeal, except as may be otherwise required by the rules and practice of this Court.

III.

The following instruments or portions of instruments contained in the record on appeal as certified by the Clerk of the District Court need not be printed and shall be omitted from the printed record on appeal:

(a) Exhibit "A" attached to the plaintiff's complaint, purporting to be a copy of the written con-



tract between the parties, dated March 21, 1941, copy of which contract was received in evidence as Plaintiff's Exhibit 5 and is one of the exhibits to be printed;

(b) The Third Defense and Counterclaim contained in the Answer of the defendant City, and the whole of the plaintiff's Reply, as said defense was abandoned by the defendant City and it and the reply were ordered stricken in the Pretrial Order entered by the District Court, which order is to be included in the printed record on appeal;

(c) Plaintiff's Request for Admission of Genuineness of Documents or Alternatively Demand for Production of the Originals Thereof;

(d) The Court's Oral Decision, which is incorporated in the record on appeal as certified by the Clerk of the District Court as a separate instrument and is also incorporated in the Reporter's Transcript of the Evidence at pages 308 to 319, inclusive, of the reporter's typewritten transcript;

(e) The following exhibits which relate wholly to matters or issues not involved in this appeal: Plaintiff's Exhibits 3, 4, and 7 to 16, inclusive, and Defendant's Exhibit A-4.

#### IV.

This stipulation is intended to comply with the provisions of subdivision 6 of Rule 19 of the Rules

of Practice of this Court concerning the designation of parts of the record for printing.

Dated this 30th day of August, 1947.

/s/ R. M. RYBOLT,

/s/ F. D. METZGER,

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Appellant.

/s/ CLARENCE M. BOYLE,

Corporation Counsel,

Attorney for Appellee.

[Endorsed]: Filed Sept. 5, 1947.



